



# OBSTACLE COURSE

How the UK's National Contact Point handles  
human rights complaints under the OECD  
Guidelines for Multinational Enterprises

**Obstacle course:**

How the UK's National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises

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# Executive summary

National Contact Points (NCPs) have become prominent as a non-judicial mechanism for addressing the conduct of multinational enterprises. They are part of the implementation process for the OECD Guidelines for Multinational Enterprises (the Guidelines), which provide principles of good business practice consistent with applicable laws and internationally recognised standards in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.<sup>1</sup>

The 46 governments which have adopted the Guidelines include all OECD members and also a number of other states which have agreed to adhere to this instrument. They are all required to set up NCPs to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of complaints arising from alleged breaches.

Since their initial adoption in 1976, the Guidelines have undergone various revisions, including a significant revision in 2011 to give a greater emphasis to human rights, drawing on the UN Guiding Principles on Business and Human Rights. The Guidelines currently include a specific chapter on human rights which sets out the main elements of what is required of businesses if they are to respect human rights.

NCPs are required to observe the OECD's implementation procedures of the Guidelines, known as *Procedural Guidance*, which sets out the expectation that NCPs operate in accordance with core criteria of visibility, accessibility, transparency and accountability.

The prominence of the Guidelines and of NCPs was enhanced in June 2015 when the G7 leaders' declaration called for the strengthening of NCPs in the context of providing access to remedy:

*'We also commit to strengthening mechanisms for providing access to remedies including the National Contact Points (NCPs) for the OECD Guidelines for Multinational Enterprises. In order to do so, the G7 will encourage the OECD to promote peer reviews and peer learning on the functioning and performance of NCPs. We will ensure that our own NCPs are effective and lead by example.'*<sup>2</sup>

The UK NCP, based in the Department for Business, Innovation and Skills (BIS), enjoys a reputation as being one of the best performing. This is largely the result of structural and procedural reforms introduced in 2008 following criticism of the NCP's handling of allegations of misconduct by British companies operating in the war-torn Democratic Republic of Congo.

This study considers the trends in the 25 complaints alleging breaches of the human rights principles of the Guidelines that have been submitted to the UK NCP since the 2011 revision. It categorises the business sectors associated with the complaints and details the nature of the allegations against the companies concerned.

The report examines how complaints have been dealt with by the UK NCP across three stages – initial assessment, mediation and determination. It assesses the extent to which the NCP complies with the OECD Guidelines' implementation procedures and the extent to which the NCP's statements and decisions are aligned with the Human Rights chapter of the Guidelines. Recommendations are made for improving the effectiveness of the UK NCP with regard to these findings.

The main findings and conclusions are as follows:

## **Lack of predictability, accessibility and compatibility with the Guidelines**

The rejection or referral to other NCPs of two out of three cases at the initial assessment stage and the frequent delays in the overall complaint procedure reflect a pattern of obstacles. Even in cases that pass the initial assessment, the UK NCP tends to reject parts of the allegations raised in a complaint while accepting others. It appears that the NCP rejects parts of complaints alleging actual negative human rights impacts while accepting for further examination parts of complaints related to the general policies and processes of companies with regard to respect for human rights.

The rationale for rejecting the majority of cases submitted and for refusing to consider key aspects of complaints is unclear and appears to reflect a misinterpretation of the Guidelines. This raises questions about the way the UK NCP's handling of cases fulfils the criteria of accessibility, predictability and compatibility with the Guidelines as set out in the Procedural Guidance.

## **Ignoring objectives of complainants**

It is paradoxical that while the UK emphasises the role of its NCP as a mechanism for accessing non-judicial remedy,<sup>3</sup> the modus operandi of the NCP appears to ignore the objectives of complainants who allege human rights abuses resulting from the activities of UK companies.

Complaints are filed on behalf of both identifiable and non-specific victims with the expectation that the NCP takes into account the needs of victims throughout the complaint process. There is limited evidence of this happening, particularly with regard to the complainants' objective of positively changing the conduct and operations of companies to improve conditions on the ground and also preventing ongoing or future abuses within a realistic and agreed timeframe.

Complainants expect the NCP to advise and make general statements on the applicability and implications of the Guidelines for specific business sectors, but this doesn't happen. Nor does the UK NCP encourage companies to implement and disclose their human rights due diligence in the specific contexts where affected communities are at risk. Instead, the NCP appears to settle for a general level of due diligence on the part of companies, which falls short of what is needed to avoid harm in some of the cases submitted.

Some harms can best be avoided by a cessation of operations or termination of the company's contract to pursue an activity, but the NCP appears reluctant to make such a determination despite the preventive aspects of the Human Rights chapter of the Guidelines.

The NCP also appears unable to respond to precarious situations faced by communities, such as when health or access to safe drinking water is at risk. This failure undermines the effectiveness of the complaint mechanism as a 'problem-solving approach' to improving conditions on the ground. The NCP lacks procedures to allow complaints to be fast-tracked in certain cases, particularly to avoid imminent harm.

## **Inappropriately high evidential thresholds**

The large proportion of cases that are rejected at the initial assessment stage reflects the high evidential threshold that the UK NCP imposes on complainants that goes beyond the requirements of the Guidelines. In nine of the rejected cases the NCP has cited the reason for rejecting the complaint as being that the link between the activities of the company and the issue raised is not substantiated. According to the OECD's Procedural Guidance, this is a factor that the NCP should take into account, but only to '*determine whether the issue is bona fide and relevant to the implementation of the Guidelines.*'<sup>4</sup> By elevating such factors into absolute requirements, the UK NCP is adopting an excessively narrow interpretation of the Procedural Guidance on initial assessment. The NCP also risks making arbitrary judgements at the initial assessment stage without proper examination

of the evidence, leading to dismissal of complaints on dubious grounds, as evidenced in some of the case studies.

The NCP has taken a particularly tough line on adequacy of sources and sufficiency of evidence in those cases involving telecommunications companies, which relied on sources that had either been leaked or destroyed, or which were available to the general public. In the *Reprieve v BT* complaint, the NCP took the view that Reprieve's failure to uncover new evidence that was not already in the public domain undermined its interest in the case.<sup>5</sup> The NCP also decided that a source document that is not available to the company, and which the company is not party to, should be inadmissible as a means of substantiating the company's link to the complaint.

Such subjective and counter-intuitive interpretations raise the bar beyond what is set out in the Guidelines and beyond what is reasonable.

## Inconsistency and Invention

The UK NCP makes it particularly difficult for complainants to substantiate that companies have 'caused or contributed' to adverse human rights impacts. In the case of *Crude Accountability et al v KPO Consortium*, relating to the environmental and social impacts of an oil and gas facility on a village in Kazakhstan, the NCP decided that the alleged impacts were not directly related to the company's operations but to the state, because the obligations to resettle under Kazakh law fell to the government.<sup>6</sup> This misses the point that the human rights impacts were caused by the consortium's activities. The fact that the state was obliged to resettle the households does not change the nature of the impact or of the company's responsibilities under the Guidelines. It is an explicit requirement of the Human Rights chapter that companies '*within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*'

In *Lawyers for Palestinian Human Rights v G4S*, the NCP rejected one of the allegations because it found that the company's security equipment and services did not make a 'substantial contribution' to the violations that were being committed in certain Israeli government facilities and operations.<sup>7</sup> This test formulated by the UK NCP is not reflected in the Guidelines. The Commentary to the Human Rights chapter states that '*where an enterprise contributes or may contribute to such an impact [adverse human rights impact] it should take the necessary steps to cease or prevent its contribution...*'.<sup>8</sup> This implies a lower threshold of culpability to the 'substantial contribution' test adopted by the NCP.

The UK NCP has been inconsistent in how it requires complainants to substantiate that companies are 'directly linked by a business relationship' to adverse human rights impacts. In the case of *Privacy International v Gamma*, the NCP accepted the case on the grounds that there may have been a link between the company's 'malware' products and its alleged human rights impacts on activists protesting against the Bahraini government.<sup>9</sup> This case was accepted despite the impossibility of proving conclusively that the software products were a factor in the human rights violations committed by government agents. It was sufficient for the complainant to show that the company and the government of Bahrain had a 'business relationship' that may have been linked to the violations that occurred.

A different threshold was applied in the *Reprieve v BT* complaint, where it was alleged that BT's fibre optic cables were providing communications between two US military bases, one in the UK and one in Djibouti, facilitating the launch of drone strikes against targets in Yemen that had adverse human rights impacts. In this case, the UK NCP did not accept the complaint for examination on the grounds that the human rights impacts were not linked by a business relationship, in so far as the complainants could not prove that the fibre optic cables operated by BT were necessary for the drone operations conducted by the US.

A similarly cautious approach was taken in the case of *SEW and Stroitel v 3 Banks*, where it was alleged that three banks had a business relationship with a Russian company operating an oil and

gas production complex in Russia that had adverse human rights impacts on local property owners. The NCP rejected the complaint against one of the banks (Bank A) on the grounds that the loan by a syndicate of 20 banks, of which Bank A was one, was insufficient to establish a direct link with the Russian company's operations.<sup>10</sup> This interpretation differs from other interpretative guidance such as that provided by the OECD Global Forum on Responsible Business Conduct<sup>11</sup> and the Office of the UN High Commissioner on Human Rights. The latter has defined business relationships to *'include indirect business relationships in a [business enterprise's] value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.'*<sup>12</sup> On this basis, any bank that is party to a syndicated loan to a business that causes or contributes to human rights violations should be viewed as linked to those violations by a business relationship.

## **Downplaying future impacts**

The UK NCP has been reluctant to address future threats to human rights arising from current activities. In the *IAP and WDM v GCM* case, the NCP restricted the scope of its examination of impacts to a narrow timeframe between the revision of the Guidelines in September 2011 and the receipt of the complaint in December 2012.<sup>13</sup>

Such a narrow timeframe is incompatible with the serious and far-reaching human rights issues at stake in the event that an open-pit coal mining project goes forward in a highly populated and agricultural region of Bangladesh. The complainants, citing evidence from independent human rights experts, warned of the serious human rights violations that would occur, including damage to ecosystems and impacts on the rights to water, food, livelihood and housing.

The NCP's refusal to examine the future impacts of the proposed mine was based on the view that the complainants had failed to establish that the impacts could not be avoided or mitigated,<sup>14</sup> despite the intervention of several UN Special Rapporteurs who called on the government of Bangladesh not to allow the project to go ahead because of the massive disruption it was expected to cause.

The failure to reflect the views of UN human rights experts seems incongruous and implies an unwillingness or inability on the part of the UK NCP to give weight to authoritative human rights sources.

The reluctance to address future impacts undermines the preventive aspect of the Guidelines and the specific requirements of the Human Rights chapter that companies 'avoid causing or contributing to adverse human rights impacts' and that they 'carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risk of adverse human rights impacts'.<sup>15</sup>

The UK NCP has re-interpreted this definition in a way that downplays the human rights context of the issues raised in the complaint. A more forward-looking and contextual approach is needed that reflects the realities of a company's proposed operations for those actually affected or at risk of being affected in future.

## **The Steering Board loses its grip**

The UK has an NCP structure that is unique among its peers and which has helped to create a degree of independence. While the NCP is based in BIS, it has an inter-departmental Steering Board with four external members. The Steering Board is mandated to provide advice, oversee the effectiveness of the NCP and review decisions taken by the NCP to ensure that the correct procedures are followed.

Reviews offer an invaluable opportunity for the Steering Board to clarify certain procedural issues. But there seems to be an incongruity between the Board's increasingly stringent and legalistic views on the evidence required to substantiate a complaint at the initial assessment stage (set out in the UK NCP's revised procedures<sup>16</sup>) and the OECD's interpretation of the Procedural Guidance.<sup>17</sup>



This study provides evidence of the UK NCP's failure to implement some of the recommendations of the Steering Board, and of the Steering Board's failure to direct the NCP to correct deficiencies in its procedures, including misinterpretation of the Guidelines. The integrity of the NCP process depends on the Steering Board's willingness and ability to challenge the NCP's recommendations where appropriate and to consider fully the concerns of complainants.

The Steering Board appears to be failing in its role of providing an effective oversight mechanism. The main consequence of this is a lack of pressure on the NCP to improve its functioning and a lack of confidence in the review procedure on the part of complainants.

Overall, the UK NCP team in combination with the Steering Board is losing its previously displayed leadership over implementation of the OECD Guidelines, and also its grasp of fundamental issues.

## Partiality

While the NCP exists to promote responsible business conduct on the basis of self-regulatory and voluntary standards, this is not the main purpose of the complaint mechanism. Its primary function is to enable dialogue and negotiation between parties to resolve issues and improve business conduct on the basis of the Guidelines.

In its assessment and examination of cases, it is understood that the NCP relies on documents and reports provided by both the complainants and the company as evidence and counter-evidence. However, in contrast to the high level of specificity required from complainants, it appears that the expectations of the NCP towards companies to provide evidence of responsible business practice are not as stringent. This concern has arisen at the initial assessment stage and also during the examination and mediation stages.

The problem of partiality in obtaining evidence may be linked in some cases to the refusal of the company to disclose documents it declares confidential, which the NCP does not have the power to challenge. This limits the type of evidence available to the NCP to assess the company's conduct.

In *RAID and ACIDH v ENRC*, the NCP did not require that the company produce the relevant documents showing that it complied with the Democratic Republic of Congo's environmental regulations for mining companies.<sup>18</sup> In *IAP and WDM v GCM*, despite the evidence demonstrating the inevitable harms which would ensue should the mining project go ahead, the NCP restricted the scope of examination to whether the company met the international standards to which it was committed and whether it included measures to foster trust among local communities.<sup>19</sup>

Even when companies provide information, there is no certainty that this will be relevant to the most salient human rights issues raised in the complaint. The NCP's reliance on company information, some of which may not be publicly available and therefore not subject to wider scrutiny, is problematic. Reports tend to emphasise what a company does well that can contribute to human rights and sustainable development, rather than actual adverse impacts.<sup>20</sup> In this regard, company material may provide a picture that is partial and unreliable.

The evidence from this study is that documents provided by companies do not appear to be subject to the same level of scrutiny, reflecting an apparent imbalance between what is required of complainants to substantiate each of their allegations and what is required of companies to rebut those allegations. Too much weight is given by the NCP to general reporting information from companies. This creates a situation whereby the NCP is inclined to accept uncritically a company's self-assessment reports without probing much further how they have carried out due diligence and human rights impact assessments.

## **Under-resourced**

The focus of this report is on the complaints handling functions of the UK NCP with regard to the substance and procedures of the OECD Guidelines. This study does not address the extent to which the NCP is adequately resourced to fulfil its remit or the potential conflicts of interest arising from locating a complaints mechanism against UK companies in a government department whose main goal is to promote UK business interests.

However, resourcing is a key factor in so far as if the UK government chooses not to allocate sufficient resources to its NCP to handle the large volume of complaints it receives in a way that is fair, effective and reflects the applicable rules, then this is a clear failing on the UK's part. Amnesty International believes that the UK has a responsibility, if not an obligation, to ensure its NCP's complaint handling mechanism is fit for purpose and reflects international human rights standards. In this context, the UK NCP as a state-based non-judicial mechanism cannot cite lack of capacity as a justification for lack of due process and poor decision-making.

The failings referred to in this report are not intended to reflect on the performance, diligence or capability of any individual members of the NCP team, who by all accounts are doing a difficult job to the best of their ability under immense pressure.

The experience of the complainants featured in this study provides clear evidence that the UK NCP is struggling to cope with the volume of complaints received and to deal with the complex procedural and conceptual issues underpinning them. The high rate of rejection of complaints at the initial assessment stage may be attributable to lack of capacity and relevant expertise, which undermine the NCP's ability to fulfil its role.

## **RECOMMENDATIONS**

### **Structural**

#### **The UK NCP**

- The NCP should be reconstituted to incorporate a Panel of Experts composed of a roster of suitably qualified independent specialists with human rights and environmental experience, drawn from academics, lawyers, mediators, judges and others, who would undertake initial assessment, investigation and determination of complaints submitted to the NCP.
- The appointments process for this proposed Panel of Experts should be overseen by the 'independent' Steering Board rather than by BIS.
- The NCP's role in complaints handling would be that of a secretariat.

#### **The Steering Board**

- The Steering Board should be reconstituted to enable it to exercise effective oversight of the NCP, and to ensure its independence, objectivity and impartiality from vested interests.
- The Independent Steering Board's terms of reference should be revised to reflect its independence and impartiality, to ensure clarity of roles and responsibilities, and to embody explicit rules of engagement for interacting with the NCP, with the proposed Panel of Experts, and with all parties to the complaint. Members of the Independent Steering Board should be external, appointed from outside government departments.
- The Independent Steering Board should be expanded to eight external members to ensure adequate capacity to deal with the volume of reviews that take place, and to provide the appropriate level of critical scrutiny.

#### **Government departments**

- Government departments should reinforce adherence to the OECD Guidelines as part of their objectives in supporting and interacting with businesses, and in promoting UK investment abroad.

## The OECD

- The OECD Secretariat should enhance its capacity to bring about improved NCP performance with regard to the issues raised in this report and the obstacles faced by complainants.

## Procedural

### Appointment of UK NCP

- The NCP (including the proposed Panel of Experts) should be appointed with regard to the expertise necessary to understand complex issues in the field of business and human rights, including environmental impacts, and to interpret them in light of the OECD Guidelines for Multinational Enterprises.
- The appointment process for the NCP should be transparent, competence driven and overseen by the Independent Steering Board.

### The UK NCP's capacity

- The staffing and financial resources made available to the NCP should reflect the capacity that is necessary to handle the volume of complaints received through all stages of the procedure, including assessment, mediation, determination and follow-up.

### The Review procedure

- The Review procedure requires fundamental reform. Requests for reviewing NCP decisions should be handled directly by the Independent Steering Board and removed from the influence of the NCP. Grounds for review should encompass substantive errors in the application of the Guidelines to the case in question.

## Substantive

- Complaints should be assessed and examined on merit with regard to the objectives and substance of the OECD Guidelines and evolving concepts in the field of business and human rights to ensure consistency and predictability.
- The NCP's definition of what constitutes a successful outcome to a complaint should be framed in a way that encompasses, as appropriate, changes in the conduct of the company and improved impacts for those affected on the ground.
- The current practice of imposing unreasonably high and sometimes unobtainable evidential thresholds at the initial assessment stage, that go beyond what is required to establish a complaint as 'bona fide and relevant to the implementation of the Guidelines', should be ended.
- Where the alleged conduct of a company is likely to have future harmful impacts on affected communities, these impacts should be considered as part of the process of determining whether there has been a breach, in light of the preventive aspects of the Guidelines.
- Where there is evidence of a company that is the subject of a complaint having 'caused or contributed' to human rights abuses, with regard to how such terms are defined in human rights norms or by expert opinion, the NCP should make a determination of a breach of the relevant provision of the Guidelines.
- Clear and transparent rules reflecting the above recommendations should be established.

## Consequences

- A company found to be in breach of the Guidelines should face consequences in keeping with the gravity of the breach. Such consequences might include denying access to public support and services, such as export credits. In cases of serious abuse, the UK government should ensure that civil, administrative and criminal liability mechanisms can be pursued respectively by complainants, regulatory bodies and the criminal justice system as appropriate.

# 1 Introduction

National Contact Points (NCPs) have become one of the most prominent non-judicial mechanisms for addressing the conduct of multinational enterprises.<sup>21</sup>

The OECD Guidelines for Multinational Enterprises was the first mechanism set up to consider complaints about multinational companies. The UK, which has received the largest number of complaints, has one of the most experienced NCPs.<sup>22</sup> This report examines the handling of complaints against British-based companies submitted to the UK NCP since 2011 for breaches of the OECD Guidelines, in particular those involving alleged human rights violations. Indeed most of the complaints submitted to the UK NCP from 2001 onwards contain allegations of human rights violations.<sup>23</sup> With the incorporation of a Human Rights chapter and its focus on due diligence and business relationships there has been a surge in the number and scope of complaints related to human rights. But, paradoxically, in the eyes of complainants, this has not led to improved outcomes. Despite the greater clarity that the UN Guiding Principles were supposed to bring to what it means for business to respect human rights, since 2011 the UK NCP's understanding of these issues seems to have become more restrictive and blurred – leading to the rejection, often without solid grounds, of the majority of complaints filed. This study seeks to examine the reasons for this paradox.

The UK NCP is based in the Department for Business, Innovation and Skills (BIS). According to the government's booklet on the complaints procedures, *'BIS Ministers play no part in the NCP's decisions on complaints, and have delegated general oversight of the NCP to its Steering Board which includes external members as well as representatives of Government departments'*.<sup>24</sup> But there remains a perception among complainants and NGOs of a pro-business bias that affects the independence of the NCP.

The report first looks at the number and trends in the complaints that have been submitted to the UK NCP, it categorises the industries or business sectors associated with the complaints and details the nature of the allegations made against the companies concerned. It then examines how the complaints have been dealt with by the UK NCP and assesses the extent to which they comply with the OECD Guidelines' implementation procedures and with the substantive elements of the Human Rights chapter of the Guidelines.

The report tracks the progress of human rights cases through the OECD complaints procedure, which essentially has three stages:

- Initial assessment
- Mediation
- Determination of breaches

The UK procedures have some additional and unique features:

- Professional mediators are used;
- Final statements include determinations as to whether a breach has occurred;
- Review: alleged procedural failings by the UK NCP can be referred to the Steering Board;
- Follow-up: after one year the UK NCP invites the parties to a complaint to report on how its recommendations have been implemented and issues a statement.

The concluding section contains recommendations to the UK government for ways of enhancing the effectiveness of the UK NCP and restoring its reputation as a leader in the field of business and human rights. Appendices to the report give a detailed break-down of all of the complaints filed and their status.

## 2 Background

The OECD Guidelines for Multinational Enterprises (the Guidelines) came into being as a response to disquiet over the involvement of US multinationals in the overthrow of the democratically elected Allende government in Chile in 1973. The Guidelines are a comprehensive code of responsible business conduct that adhering countries have committed to promoting. Since their adoption in 1976, the Guidelines have undergone various revisions, the most significant being in June 2000 and May 2011. The current text sets out principles and standards for responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.<sup>25</sup>

The 46 governments which have adopted the instrument are obliged to set up National Contact Points (NCPs) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines in ‘specific instances’ – the term used for complaints.<sup>26</sup> Most NCPs are housed in government ministries; a few, such as the Norwegian and Dutch NCPs, are composed of independent experts, not government officials.

The UK enjoys a reputation as being one of the best performing NCPs. This is largely the result of structural and procedural reforms that were introduced following widespread criticism of the handling of allegations of misconduct by British companies operating in the war-torn Democratic Republic of the Congo (DRC). In 2002 a UN Panel of Experts in a report to the Security Council had accused British and other multinational companies of having violated the Guidelines in their dealings with ‘criminal networks’ that had pillaged the country.<sup>27</sup> The UN panel forwarded its dossiers of information concerning British companies to the UK NCP for further investigation. But progress was slow and Members of Parliament expressed concern that the NCP’s statements on the DRC cases had failed to clarify matters, leaving significant issues unresolved. The MPs recommended that:

*‘NCPs should leave companies in no doubt as to the acceptability or otherwise of their conduct. It is vital that companies are given guidance as to how to consider and interpret the Guidelines in the complex environments in which they operate.’<sup>28</sup>*

In 2008, following extensive consultation, new procedures were introduced by the government to increase the effectiveness of the UK NCP. These included an agreed time frame for the examination of complaints and the publication of initial assessments and final statements which, at the conclusion of the case, would make clear if a breach of the Guidelines had occurred. Other innovations included the use of professional mediators and the creation of a Steering Board, chaired by a senior government official, to oversee the operations of the UK NCP and offer advice on the interpretation of the Guidelines. The Steering Board, half of whose members are external (they were nominated by business, the Trade Union Congress and NGOs), was also empowered to consider appeals concerning procedural issues in the NCP’s handling of a case.<sup>29</sup>

Some of the UK’s new procedures were adopted by other NCPs and were even incorporated into the OECD’s 2011 revised procedural guidance.<sup>30</sup> This marked the high point of the UK NCP’s performance.

## 2.1 The 'Protect, Respect and Remedy' framework and the UN Guiding Principles

As one of the few and earliest examples of non-judicial remedies for alleged corporate misconduct, the OECD Guidelines have also been closely scrutinised by Professor John Ruggie, during his mandate as the Special Representative of the Secretary-General to the United Nations on the issue of human rights and transnational corporations and other business enterprises. In his 2008 report, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', Professor Ruggie outlined the role that the NCPs could potentially play within the context of his framework. But he noted that *'with a few exceptions, experience suggests that in practice [the NCPs] have too often failed to meet this potential'*.<sup>31</sup>

The 2011 revision of the Guidelines includes an entire chapter devoted to human rights, modelled on the UN Guiding Principles on Business and Human Rights. The new chapter puts an emphasis on what it means for business to respect human rights, as well as stipulating the systems such as due diligence that companies need to put in place in order to meet their responsibility to respect human rights. But the NCP still does not have any powers of enforcement, cannot impose penalties on companies or award compensation to victims. It has some capacity to investigate complaints directly, by seeking information from parties to the dispute, and plays a mediating role in bringing them together to facilitate dialogue and a resolution to the case. If there is no resolution, the NCP can review the evidence, consult experts and issue a statement on the case.

## 2.2 UK National Action Plan

Despite these limitations the UK government presents the work of the NCP in its National Action Plan for implementing the UN Guiding Principles (NAP) as forming part of its obligation to provide access to remedy for human right abuses resulting from business activity.<sup>32</sup> Professor Ruggie accepts that the OECD's NCP system 'has become a potential venue' to which human rights complaints regarding any and all internationally recognized rights can be brought against multinational enterprises. But he concludes, in spite of the many debates, consultations and accumulated experience over the years since the adoption of his framework, material consequences in the event of a negative NCP finding against a company are lacking.<sup>33</sup> In the eyes of complainants this leaves affected people without an effective remedy and companies without a deterrent.

## 2.3 Operational changes affecting UK NCP

In 2012 the departure of experienced staff resulted in a loss of institutional memory. None of the current UK NCP team has a human rights background. All these factors combined with changes to the way the Steering Board is organised (such as the suspension of the practice of appointing alternate external members), has reduced the range of views and expertise available to the NCP, which has had a negative impact.<sup>34</sup> There has been a significant decline in the quality of final statements.<sup>35</sup> With no in-house expert, the new team has struggled to interpret the meaning of the human rights provisions of the Guidelines,<sup>36</sup> and with a smaller pool of external members to draw on, there have been delays in the review process, which the Steering Board has acknowledged to be unacceptable.<sup>37</sup>

## 2.4 OECD's proactive agenda

This relative decline in the performance of the UK NCP has coincided with a pushback from the OECD's Business and Industry Advisory Committee (BIAC), which has sought to redirect the attention of the NCPs towards promotional activities and downgrade the complaints procedure. Under pressure from business groups, unhappy about the prominence given to complaints, the OECD included in the 2011 update a provision to work with all stakeholders on 'a proactive agenda'.<sup>38</sup> According to BIAC the objective is for all partners to look over the horizon at potential challenges and collaborate on devising solutions, consistent with the principles of the Guidelines, to support the efforts of multinational enterprises to address challenges at an early stage in their development.<sup>39</sup> Such an approach is viewed as conducive to investment:

*'For business, the OECD is key to promote an open international investment climate. Together we implement our pro-active investment agenda.'*<sup>40</sup>

Both OECD Watch<sup>41</sup> and the Trade Union Advisory Committee (TUAC)<sup>42</sup> have expressed concern about the change of emphasis, the diversion of resources away from handling complaints and the proliferation of proactive agenda projects that in their view have been detrimental to the goal of improving the NCPs' core activities.<sup>43</sup>

The UK NCP does not provide any breakdown of how its resources are used: for example, how much staff-time is allocated to outreach and promotional activities as opposed to coping with its heavy case load. The impression given is that staffing levels are insufficient to deal with what are complex complaints. This has contributed to excessive delays and affected the quality of decision-making.

Professor Ruggie recognises that some complaints '*drag on for extended periods of time*', but counters the criticism from OECD Watch and others by comparing the NCP system to '*court proceedings and quasi-judicial international and regional systems [that] can take even longer*'.<sup>44</sup> But this fails to address the problem that the NCP mechanism is supposed to be a simpler and quicker alternative to resolving actual or potential human rights harms. Clearly the NCP process does not offer the same legal guarantees as a court case nor does it hold out the prospect of judicial determination and eventual remedy. Lengthy delays in the handling of complaints – during which time the complainants are supposed to maintain a news blackout – seriously undermine the value of the process.

## 2.5 Contested purpose of OECD Guidelines

While the OECD, the G7 and the UK are all positioning the Guidelines as a mechanism for states to provide remedy for corporate abuses, all the evidence indicates that remedy is rare.<sup>45</sup> To be effective according to international human rights law, remedies must be capable of leading to a prompt, thorough, and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.<sup>46</sup>

Amnesty International's research and analysis indicates that victims of human rights violations arising from the conduct of corporations frequently face significant challenges when seeking remedy. These range from a lack of political willingness to ensure remedy, to procedural and legal hurdles which people do not have the money or knowledge to overcome. The nature of the obstacles that victims face is shaped by a range of factors which are examined in a series of case studies documented by Amnesty International.<sup>47</sup>

While it is not the purpose of this study to examine the extent to which complaints submitted to the UK NCP result in a remedy for victims, this is nevertheless an issue that remains relevant and very close to Amnesty International's wider concerns about the obstacles faced by victims of corporate abuses who seek to secure their right to remedy.

The ambiguous and hybrid nature of the Guidelines means that their purpose continues to be contested: they are neither a fully-fledged human rights instrument nor simply a means of promoting investment and open markets; the NCP has only a weak regulatory function but it can nevertheless provide a degree of accountability for the environmental and human rights impacts of British companies operating abroad. The more convoluted, legalistic and drawn out NCP procedures become, the less useful they are to the victims of corporate abuse. As Professor Ruggie rightly observes:

*'Forty years of pure voluntarism should be a long enough period of time to conclude that it cannot be counted on to do the job by itself.'*<sup>48</sup>

### 3 Methodology

This study focuses on the way the UK NCP has approached complaints received since September 2011. Specifically, it examines how it has implemented the 2011 Guidelines in the 25 cases which raised complaints based on the new Human Rights chapter in the period 2011-2015. The study draws on a survey review and case studies based on a document analysis and interviews with key informants who have been involved in filing the complaints.

The documents reviewed were sourced from the UK NCP's website<sup>49</sup> and OECD Watch's website which provide the most up-to-date databases. The documentary material sourced from these sites includes documents originating from:

- The NCP: initial assessment statements, final statements and other clarification statements published for specific cases, Procedural Guidance, annual reports;
- The Steering Board: review statements;
- The complainants: reports of the complaints (where available) and press releases;
- The complainants and the company: joint statements;
- The company: press releases;
- OECD Watch: its database provides contextual summaries which offer relevant information about the background of complaints.

For reasons of confidentiality in the complaint process not all documents are publicly available. For example, many of the complaints submitted to the NCP are not in the public domain, nor are exchanges between the parties. This means that in many cases the only public documents are the UK NCP's statements and press releases from complainants and companies. This allows only a partial view of the overall cases and the perspectives of the different parties.

To complement the findings from the document analysis we have also sought the opinion of complainants through interviews or personal communications. Our focus on the complainants' views of the UK NCP gives this study a particular perspective by placing at its centre what complainants expect from the OECD Guidelines and the complaint process it offers.

The survey review draws on the documents available for the 25 human rights based complaints submitted to the UK NCP since the revision of the Guidelines in 2011. It focuses on the patterns of complaint with regard to thematic issues and business sectors, and the patterns of acceptance and rejection of complaints by the NCP. The case study analysis examines certain key aspects of rejection and selectivity in the examination of complaints. It then further explores the way the UK NCP has approached complaints and the compatibility of its decisions with the criteria set out in the OECD Guidelines Procedural Guidance and with the substantive elements of the Human Rights chapter.

#### **Number of complaints filed and reviewed in this study**

Since September 2011 the UK NCP has received 27 complaints, of which 25 allege breaches of the principles in the Human Rights chapter.<sup>50</sup> The study focuses on 22 of these cases because three complaints were referred to both the UK NCP and another NCP but were dealt with by the latter. These are *Human Rights Law Centre and RAID v G4S* (Australian NCP and UK NCP, rejected), *SEW and Stroitel v Shell* (Dutch NCP and UK NCP, rejected), and *Amnesty International and Friends of the Earth International v Shell* (Dutch NCP and UK NCP, withdrawn).<sup>51</sup>



Some complaints have been filed by a complainant against different companies but dealt with in one initial assessment by the UK NCP, while in other similar cases it dealt with each complaint individually. For instance, the UK NCP received six complaints from Privacy International against six telecommunication companies alleged to be involved in a similar breach of the Guidelines. The NCP, however, addressed the cases in a single initial assessment although, in so doing, it sought the view of each of the companies. In keeping with the complainant's filing, we consider them as six individual cases.

There are other cases which were filed against different companies for similar sets of allegations as they work in consortium or are related to the same project. The NCP addressed them separately. In *SEW and Stroitel v 3 banks*, the UK NCP treated the complaints as individual cases because of the different relationships between the banks and the gas plant. They are considered as three cases in this study.

The complaint filed by Crude Accountability et al. was originally filed with the UK NCP as a complaint against BG. However, Crude Accountability et al. also filed two complaints raising the same concerns against ENI and Chevron with the Italian and US NCPs, respectively. BG, ENI and Chevron are partners in the KPO Consortium. They accepted the invitation of the UK NCP to respond to the complaint as a consortium. This study considers the complaint against the KPO Consortium rather than against BG alone.

Finally, Reprieve submitted its complaints against BT three times; the NCP rejected the complaint each time with an initial assessment. These are counted as three different cases in the study.

An overview of the complaints including a synopsis is included:

Annex 1 – Rejected cases

Annex 2 – Fully accepted case

Annex 3 – Partially accepted cases

Annex 4 – Cases filed with both UK NCP and another NCP but dealt with by the latter.

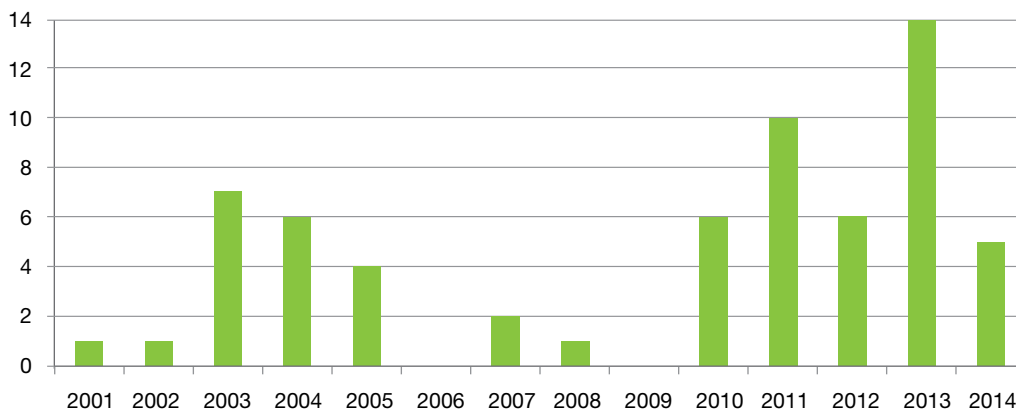
## 4 Analysis of complaints submitted

### 4.1 Trends in complaints

#### 4.1.1 Overview since 2001

Since 2001, 63 cases have been filed with the UK NCP. The majority of submissions, however, have happened since 2008 after the restructuring that year. Since then the UK NCP has received a total of 42 complaints. As illustrated in Figure 1, the number of cases saw a peak in 2013 with 14 complaints submitted in that year alone.

Figure 1 – Trends in complaints since 2001 and numbers submitted each year



This increase in cases since the revision of the guidelines follows a global trend. In a recent survey of complaints filed with all NCPs between 2000 and 2015, and specifically focusing on the period after the 2011 revision of the OECD Guidelines and the launch of the UN Guiding Principles, John Ruggie and co-author Tamaryn Nelson observed that:

*‘Although these are still early days, it appears that there may be five such impacts [of the revision of the Guidelines] to date: more human rights cases than other types of complaints; a greater diversity of human rights cases than in the past; a diversification of industries against which complaints are brought; the growing role of the Guidelines’ due diligence provisions; and a higher admissibility rate for human rights cases than for others.’<sup>52</sup>*

These trends are to a large extent reflected in cases submitted to the UK NCP. However, the UK NCP seems to be going against the trend as regards the admissibility of human rights cases noted by Ruggie and Nelson. The NCP has rejected more than half of the human rights cases submitted since the review of the Guidelines and the addition of the Human Rights chapter.

Its attitude appears to reflect and contribute to another trend identified in a recent survey by OECD Watch which finds that globally there remain far too many barriers to accessing the Guidelines’ complaint mechanism, and that NCPs have failed to correctly apply the accessibility criteria set out in the OECD Procedural Guidance.<sup>53</sup>

#### 4.1.2 Status of complaints

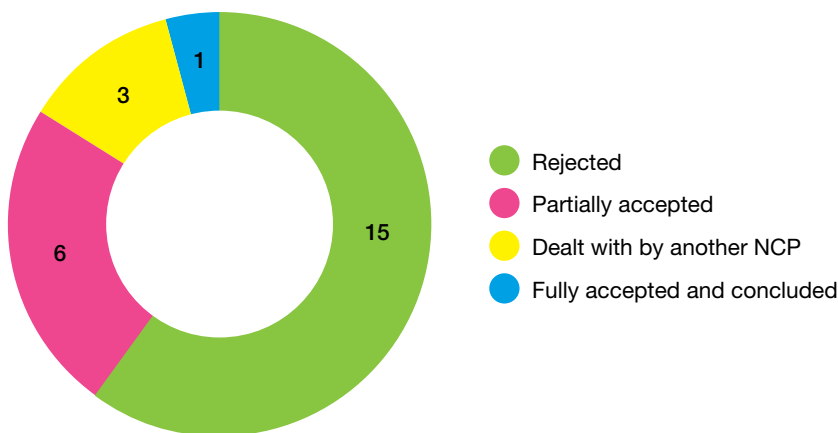
As of February 2016, 25 cases alleging violations of the Guidelines' human rights principles have been filed with the UK NCP.

##### Categories

We divided the case status into four categories:

- 'Rejected' – where the complaint was rejected outright at initial assessment;
- 'Fully accepted' – where the complaint was accepted in its entirety in so far as the NCP accepted all the allegations as meriting further examination;
- 'Partially accepted' – where the NCP only accepted some of the allegations as meriting further examination by restricting its examination to some of the elements of the Guidelines cited as breached in the complaint;
- 'Dealt with by another NCP' – where the complaint was submitted to both the UK NCP and another NCP, but was dealt with by the latter.

Figure 2 – Case status



As shown in Figure 2, out of the 25 cases filed alleging violations of the Guidelines' human rights principles:

- 15 complaints have been rejected at the initial assessment stage (Annex 1 – Rejected cases);
- One complaint has been fully accepted and concluded (Annex 2 – Fully accepted cases);
- Six complaints have been partially accepted (Annex 3 – Partially accepted cases);
- Three complaints were referred to and dealt with by another NCP (Annex 4 – Cases filed with both UK NCP and another NCP but dealt with by the latter). One of these was withdrawn before initial assessment.

The OECD Procedural Guidance provides for coordination between NCPs in specific instances involving a group of enterprises organised as a consortium or joint venture based in different adhering countries. The NCPs involved agree which NCP will take the lead.<sup>54</sup>

Three of the complaints were thus referred to both the UK NCP and another NCP: *Human Rights Law Centre and RAID v G4S* was assessed and rejected by the Australian NCP; *Amnesty International and Friends of the Earth International v Shell* was assessed by the Dutch NCP but withdrawn by the complainants, and *SEW and Stroitel v Shell* was assessed and rejected by the Dutch NCP. The UK NCP has therefore assessed 22 complaints which are the focus of this study.

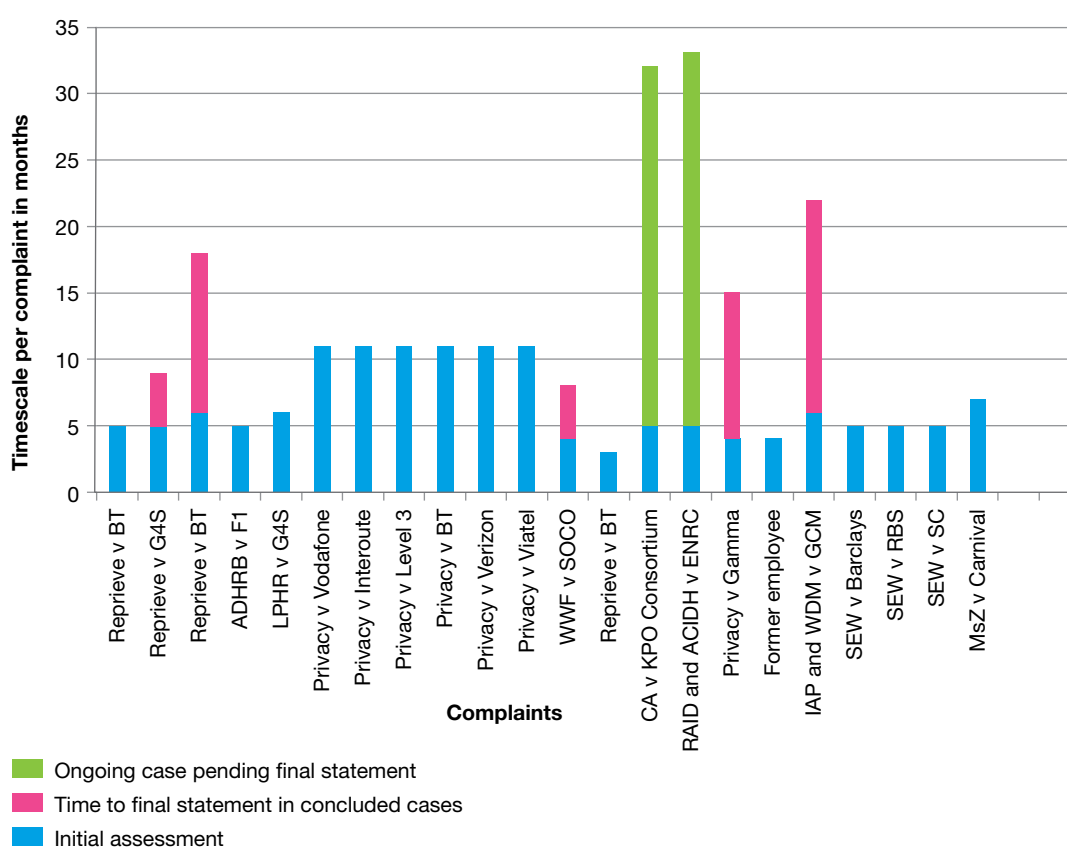
### 4.1.3 Timeframe of assessment, examination/mediation, conclusion

NCPs are required to assess, examine/mediate and conclude complaints within a one-year timeframe. Accordingly, in its Procedural Guidance the UK NCP has committed to complete the three-stage process of each complaint within a year of receiving it. It aims to complete:

- Stage 1 – initial assessment within three months of the complaint;
- Stage 2 – mediation or fact-finding to conclusion within a further six months;
- Stage 3 – final statement within a further three months.
- A fourth stage might be included to report on follow-up actions where this is recommended at the outset of the mediation or in the final statement.

The UK NCP states that it is committed to resolve complaints promptly but allows for some degree of flexibility to accommodate circumstances outside its control.<sup>55</sup>

Figure 3 – Complaints process timetable as of February 2016



An overview of the 22 cases examined by the UK NCP shows that the timetable set out in the Procedural Guidance has been difficult to achieve.

Stage 1, highlighted in blue in Figure 3, took the NCP between three months and 11 months and on average took six months to complete. According to the UK NCP the seven-month delay in the *Privacy International v 6 Telecoms companies*, for example, was due to a lack of resources and technical issues as well as to the fact that the case involved a number of companies and the business relationships proved difficult to establish.<sup>56</sup> The publication of the initial assessment was also delayed following the complainant’s request for a review of the NCP’s procedure in handling the complaint which the Review Committee eventually rejected.

The five complaints that were completed with a final statement, highlighted in pink in the graph, were concluded on average in 14.4 months. In two of these complaints, *IAP and WDM v GCM* and *LPHR v G4S*, there were inordinate delays respectively in the examination cycle and the mediation cycle.

There has also been long delay in the two complaints which are still ongoing after over 30 months – these are highlighted in green in Figure 3. The complaint filed by *Crude Accountability et al. v KPO Consortium* is pending a final statement. The complaint filed by *RAID and ACIDH v ENRC* received a final statement in August 2015, but the company requested a review.

### CASE STUDY 1: Inordinate delay in RAID and ACIDH v ENRC

The *RAID and ACIDH v ENRC* case has seen numerous delays. The NCP carried out its initial assessment in five months and the complaint was accepted for mediation. The mediation then lasted more than a year from October 2013 until it broke down in November 2014. The NCP was notified in January 2015 and the complainants requested a final examination. An informal agreement was made to conclude the case by June 2015, but the parties only received the draft final statement on 5 August 2015. Since then the company has requested a review of the procedure but no timeframe for completion has been established. As of February 2016, the case has been open for 33 months.

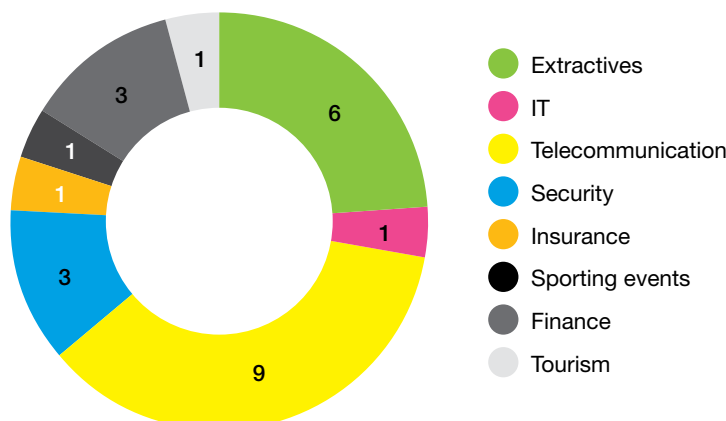
### FINDINGS 1: Issues of predictability and accessibility

The rejection or referral to other NCPs of two out of three cases and the frequent delays in the overall complaint procedure reflect a pattern of obstacles. Another significant concern for complainants arises from the recurring decision by the UK NCP to reject part of the allegations raised in a complaint while accepting others. This raises questions about the way the UK NCP's handling of cases fulfils the criteria of accessibility, predictability and compatibility with the Guidelines set out in the Procedural Guidance.

## 4.2 Categorisation of complaints by industry and issue

This section considers the 25 cases submitted since 2011 which include the 22 filed with and examined by the UK NCP alone, the two filed with both the UK NCP and another NCP but examined by the latter, and the withdrawn case. A wide range of business sectors is represented in these 25 human rights-focused cases. Extractive companies, including mining, oil and gas, and telecommunication companies have been the subject of the majority of complaints, with six and nine cases respectively. Security (three) and financial institutions (three) also feature prominently (see figure 4 below).

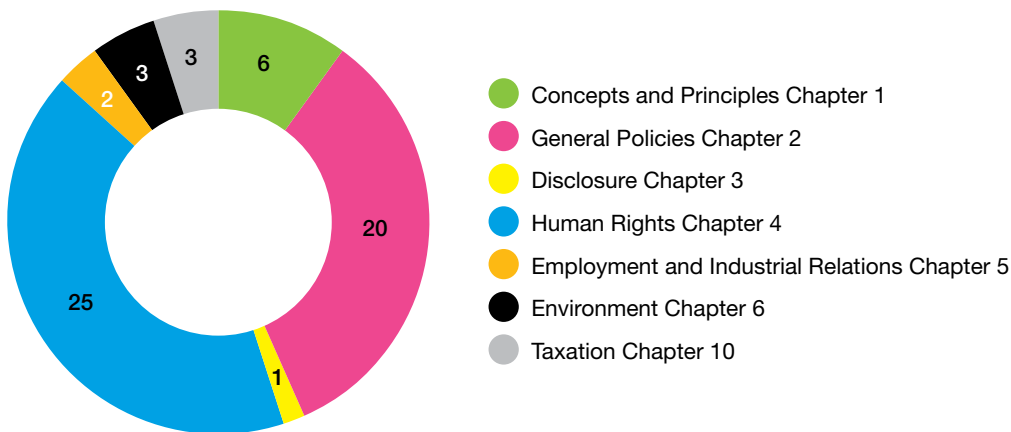
Figure 4 – Complaints and business sectors



### 4.3 Categorisation of complaints by harm caused

The current trend shows that the majority of complaints filed with the UK NCP since September 2011 allege breaches of the Human Rights chapter. Figure 5 below represents the distribution of the most frequently cited Guidelines chapters. Each of the 25 cases refers to Chapter IV on human rights, and 20 also cite Chapter II on general policies, including paragraph 2 on human rights. Of the 25 complaints alleging a breach of the human rights principles in Chapters II and IV, two complaints were submitted by individuals about which there is little information available, and 23 were submitted by NGOs.

Figure 5 – Guidelines chapters commonly cited in complaints



Despite the non-retrospective nature of the 2011 Guidelines, the Human Rights chapter seems to have encouraged the submission of complaints alleging adverse impacts by companies, arising from activities before 2011, as a means of testing the potential of the NCP complaint procedures. Furthermore, as observed in Ruggie and Nelson’s survey of global complaint trends, complaints submitted to NCPs which allege breaches of human rights also cover a greater diversity of rights violations and business sectors.<sup>57</sup>

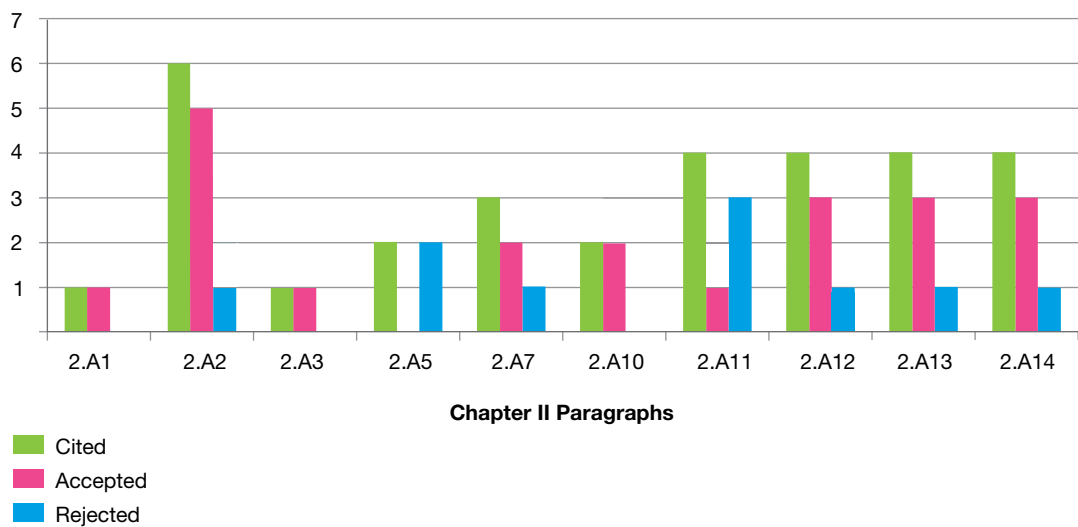
#### 4.3.1 Accepted and partially accepted human rights complaints

As seen in Figure 5 above, the most cited paragraphs are from Chapter II ‘General Policies’ and from Chapter IV ‘Human Rights’. Some of these principles figure prominently in the six complaints that have been partially accepted and the only fully accepted complaint (see Figures 6 and 7).<sup>58</sup> This section focuses on those cases specifically.

##### 4.3.1.a Chapter II

Chapter II of the Guidelines is divided into two parts, A and B. They include 15 paragraphs and two paragraphs respectively, with (A) focusing on upholding laws, standards and policies, and having appropriate processes in place to give effect to them, while (B) focuses on commitment to multi-stakeholder initiatives. The paragraphs under part A are the most commonly cited, particularly paragraphs A1, A2, A3, A5, A7, A10, A11, A12, A13, A14 with paragraphs A2, A11, A12, A13 and A14 being the most popular (see Figure 6). This signals the significance of these paragraphs for complainants when examining the impacts of companies, especially paragraphs 2A2, 2A12, 2A13 and 2A14.

Figure 6 – OECD Guidelines alleged breaches of General Policies Chapter



### KEY INFO 1: Most frequently cited breaches of General Policies

#### Chapter II – General Policies paragraphs most commonly cited in the eight partially accepted complaints and the fully accepted complaint

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:

A. Enterprises should:

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect the internationally recognised human rights of those affected by their activities.
3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.
7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.
13. In addition to addressing adverse impacts in relation to matters covered by the

Continued over »

Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.

14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

Generally the NCP accepts these principles as meriting further examination. Paragraph 2A2 is a general principle on human rights. It entreats companies to uphold the internationally recognised principle of the corporate responsibility to respect human rights set out in the UN Guiding Principles. The other principles also draw on the more general character of responsible business conduct. While what is understood by ‘adverse impact’ is not specifically defined,<sup>59</sup> paragraph 2A14 sets out the expectation that stakeholders be consulted on what they consider may be the impact of a project on their communities. Engagement with stakeholders is widely expected as a best practice principle of responsible business conduct.

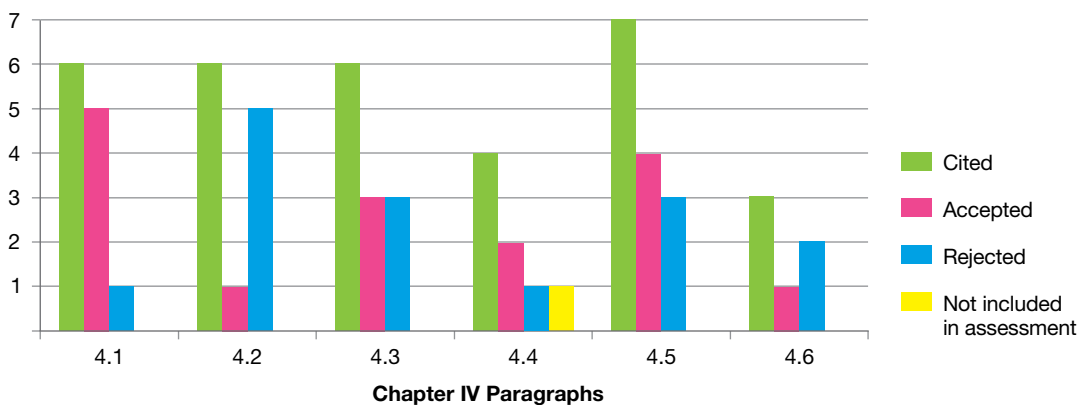
Paragraphs 2A5 and 2A11, however, have met rejection at initial assessment almost every time they are included as an alleged breach in a complaint. Paragraph 2A5 has been cited in two complaints (*WWF v SOCO*, and *Crude Accountability et al. v KPO Consortium*) but the NCP rejected the claims.<sup>60</sup> In *WWF v SOCO*, the NCP declined the opinions of international experts and other international institutions which see stabilisation clauses as potentially detrimental to the principle of the corporate responsibility to respect human rights.<sup>61</sup>

Paragraph 2A11 was cited four times and rejected on three occasions. A similar pattern of rejection can be observed with paragraph 4.2. Both principles involve the concepts of *causing or contributing* to adverse impacts and that of *addressing* those impacts. As will be examined in section 6.3, the UK NCP seems to require a particularly high level of evidence from complainants to substantiate claims involving these principles.

#### 4.3.1.b Chapter IV

Chapter IV includes six paragraphs. Paragraphs 4.1, 4.2, 4.3 and 4.5 are the most commonly cited in the eight partially accepted complaints and the fully accepted complaint.

Figure 7 – OECD Guidelines alleged breaches of Human Rights Chapter





## KEY INFO 2: Most frequently cited breaches of Human Rights

### Chapter IV – Human rights paragraphs most commonly cited in the eight partially accepted complaints and the fully accepted complaint

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

Paragraph 4.4, which requires that companies have human rights policies, is cited in four of the seven accepted/partially accepted complaints. The NCP, however, accepted for examination allegations related to paragraph 4.4 only twice. In *ADHRB et al v F1*, this resulted in a positive outcome from the mediation as the company committed itself to produce a human rights policy.

The emphasis of allegations, however, tends to be on companies' actions or omissions which have caused or contributed to human rights abuses or failed to prevent adverse impacts (paragraphs 4.1, 4.2 and 4.3 are cited in six complaints, 4.5 is cited in seven complaints). The pattern of acceptance and rejection of allegations based on these paragraphs is interesting.

- Paragraph 4.1 is the most frequently accepted (five times out of six mentions).
- Allegations based on paragraphs 4.3. and 4.5 are almost equally accepted and rejected by the NCP.
- The NCP, however, tends to reject allegations based on paragraph 4.2, cited in six complaints and rejected five times. Paragraph 4.6 (cited in three complaints) is also only accepted once by the NCP for further examination.

As was the case with principle A11 of Chapter II – discussed above – allegations based on paragraphs 4.2 and 4.6, both of which allege human rights abuses by companies, are usually rejected at initial assessment. The common justification offered by the UK NCP to reject allegations on the basis of these paragraphs is that the complainants fail to substantiate a link between the issue raised and the company's operations and Guidelines obligations.

There seems to be a conflict of interpretation over the concept of causing or contributing to adverse impacts. How do complainants interpret the Guidelines and what are their expectations of the NCP? And what are the UK NCP's own expectations and interpretations of what qualifies as an adverse human rights impact? The next chapter addresses the first question, while the second is discussed in chapter 6 which considers grounds of assessment.

## **FINDINGS 2: Issues of predictability, and compatibility with the Guidelines**

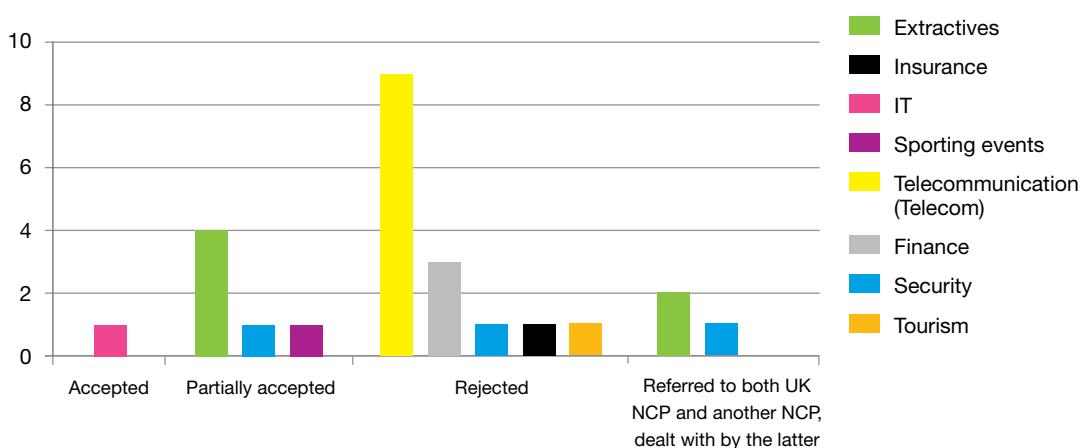
When filing a case there is no guarantee that all allegations of breaches will be examined by the NCP or included in the mediation. It seems also that the UK NCP tends to reject parts of complaints alleging actual negative human rights impacts while accepting for further examination parts of complaints related to the general policies and processes of companies with regard to respect for human rights, communications with stakeholders and due diligence. These findings raise questions about a possible selective approach from the NCP.

## 5 Complaints submitted and complainants' objectives

### 5.1 Complaints by sector and new issues under 2011 Guidelines

An overview of the case status by sector shows that some sectors are disproportionately represented among rejected cases and partially accepted cases. Figure 5 below displays the status of complaints by business sector and illustrates an imbalance of rejection and acceptance by sector.

Figure 8 – Business sector and case status



**IT and spyware (*Privacy International v Gamma*):** The IT case is the only one that has been fully accepted by the UK NCP.

**Telecoms and the use of fibre optic cable by states for mass surveillance (*Privacy International v 6 Telecommunication companies*) and arbitrary killings (*Reprive v BT x3*):** None of the nine complaints against the telecom companies has been accepted.

**Finance and investors' responsibility (*SEW and Stroitel v RBS, Barclays, Standard and Chartered*):** The three complaints against the banks have also been rejected.

**Security companies and state security (*Reprive v G4S, HRLC and RAID v G4S, LPHR v G4S*):** Only the complaint by LPHR against G4S has been partially accepted; the other two have been rejected including one which was jointly filed with both the UK NCP and the Australian NCP, for which the Australian NCP took the lead.

**Sporting events, due diligence and state repression:** Initially four complaints by *Bahrain Watch and ADHRB v F1 World Championship Ltd, F1 Management Ltd, Beta D3 Ltd and Delta 3 (UK) Ltd*, they were reduced to one complaint. Both Beta D3 and Delta were not in operation, and F1 World Championship responded on behalf of F1 Management Ltd. The complaint was partially accepted.

**Extractive companies, due diligence and sustainable development (*IAP and WDM v GCM, WWF v SOCO, RAID and ACIDH v ENRC, Crude Accountability et al v KPO Consortium*):** Of the six complaints against extractive companies, four have been partially accepted, one was referred to the Dutch NCP, and one was withdrawn before initial assessment.

The 2011 version of the Guidelines includes a new chapter on human rights which enables the filing of complaints with more detailed and specific allegations of human rights abuses by companies than the single paragraph on human rights in the 2000 version of the Guidelines.<sup>62</sup> The new principles have enabled the filing of complaints based on allegations related to business relationships

that would have previously been rejected. The inclusion of concepts such as *due diligence* and also *business relationship* (which replaced the concept of *investment nexus*) in the 2011 Guidelines has enabled consideration of cases involving complex supply chain and value chain relationships. It has been argued that the investment nexus concept had previously prevented assessment of these type of cases.<sup>63</sup> The UK NCP, however, already made use of the concept of due diligence in pre-2011 cases and examined cases with complex supply chains; e.g. *Global Witness v Afrimex*.<sup>64</sup>

Nevertheless, many situations presented to the UK NCP are new; e.g.

- Those related to the telecoms, IT and security sectors and the use of their products in controversial and sometimes unlawful state security arrangements. The NCP has observed that establishing the existence of a *business relationship* in cases involving IT and telecoms companies and a government client is often impossible because of confidentiality clauses. Such clauses prevent companies from revealing the identity of their clients and the type of relationship they have with them, while the NCP does not have the power to force companies to disclose and share documents.<sup>65</sup> (This point is discussed further in chapter 6).
- The responsibility of financial institutions has also been a problematic question because of the nature of the business relationships between minority investors and the companies in which they invest. In its initial assessment of the complaints, the UK NCP stated that it would seek clarification with the OECD Investment Committee.<sup>66</sup> This question has been a matter of debate at the level of the OECD Global Forum on Responsible Business Conduct (GFRBC) after the *SEW and Stroitel v 3 Banks* complaint was rejected. The position of the GFRBC is that in principle a minority shareholding can be seen as a business relationship.<sup>67</sup>

## 5.2 Objectives of complainants

A common criticism levelled against complainants in OECD NCP meetings is that they have unreasonable expectations about the complaint mechanism and what NCPs can do.<sup>68</sup> However, an overview of the complaints shows that complainants usually frame their objectives using the language of the Guidelines and set out what they expect from the NCP in keeping with the stages of the procedure. Therefore, another way to look at the handling of cases would be to consider the type of issues they raise and the demands made on the UK NCP by complainants. Generally, as shown in the box below, the objectives of filing a complaint are:

- to effect positive change in corporate behaviour by ensuring that a company adheres to the Guidelines,
- to achieve remedy for adverse situations, conditions, and harms caused by the conduct and operations of a multinational enterprise.

There would seem to be a large gap between complainants and NCPs with regard to the processes and actions expected of companies to achieve these objectives.

### KEY INFO 3: Most useful outcomes

#### General objectives of complainants (OECD Watch, 2015, 'Remedy Remains Rare', SOMO)

The NCP complaint process is meant to help resolve issues related to a company's adherence to the Guidelines by facilitating a dialogue process and encouraging parties to reach a voluntary agreement. However, complainants often want an outcome in the form of a remedy. This may include apologies, restitution, rehabilitation, compensation or prevention of future harm.

As a state-based non-judicial grievance mechanism, NCPs have the potential to serve as an avenue to remedy harms arising from a company's misconduct. While the aim of providing

remedy is not explicitly included in the Procedural Guidance to the Guidelines, it has been acknowledged as an important function of NCPs by governments and inter-governmental bodies, including in the June 2015 declaration of G7 leaders.

An NCP's effectiveness and its ability to ensure implementation of the Guidelines should be measured in terms of the impact it has in remedying past and ongoing harm and prompting concrete changes in a company's future behaviour.

OECD Watch identifies four results of complaint procedures which could contribute to positive changes that may amount to an effective remedy:

- A statement (either by the NCP or company) acknowledging wrongdoing;
- An improvement in corporate policy and/or due diligence procedure;
- Directly improved conditions for victims of corporate abuses;
- Compensation for harms.<sup>69</sup>

The UN Guiding Principles on Business and Human Rights and the UN Working Group on Human Rights and Transnational Corporations make it clear that a non-judicial grievance mechanism 'should be able to "counteract or make good" any human rights harms that have occurred'.<sup>70</sup>

### 5.2.1 Complaints involving state-company nexus – complainants' objectives

Complaints falling in the state-company nexus category include the IT,<sup>71</sup> telecoms,<sup>72</sup> security,<sup>73</sup> and sporting event<sup>74</sup> companies. Although these complaints involve different company and state relationships, they usually concern human rights issues where the services or the products of a company are contracted or bought by a government and serve in controversial state security arrangements including mass surveillance and arbitrary killings via drones. This is the case for instance in *Privacy International v Gamma*, *Privacy International v 6 Telecoms*, *Reprieve v BT*, *Reprieve v G4S*, and *LPHR v G4S*. Issues related to a state-company nexus also arise where the company pursues its operations in the context of state repression against its people, e.g. in the *ADHRB et al v F1* complaint.

Despite the intrinsic differences in these cases, there are some similarities in the allegations. Furthermore the complainants have similar expectations as regards the changes expected in the conduct of the companies and what they seek from the complaint mechanism. A core objective in these complaints is to facilitate a change in the companies' conduct towards achieving respect for human rights, and ensuring they are held accountable when they fail to do so.

The three following examples indicate that complainants generally expect that the NCP will:

- Investigate allegations;
- Make a determination on the companies' compliance with the Guidelines or lack thereof.

In order to fulfil their objectives the complainants seek that the Guidelines and the complaint procedure encourage and require companies to:

- Produce a human rights policy where they do not already have one and transparently apply human rights due diligence across their operations;
- Conduct in-depth and not just general due diligence, where there are heightened risks of serious human rights impacts, and transparently disclose the steps taken throughout;
- Challenge and resist the requests of governments where these contradict or breach international human rights standards;
- Terminate the contract and cease to provide their services to the state client where their services or products are used in security programmes causing or contributing to human rights abuses;
- Mitigate and address adverse human rights impacts where these are identified.

Table 1 Telecom and IT cases: Objectives of complainants as submitted		
Rejected Cases		Accepted Case
<p><i>Reprieve v BT (2nd complaint submitted in 2014)</i></p> <p>After a <b>full investigation</b>, the <b>UK NCP</b> should ask BT to take the following steps to address its adverse human rights impacts:</p> <ul style="list-style-type: none"> <li>• <b>Cease to provide services under the Contract;</b></li> <li>• In the alternative, <b>procure an amendment to the Contract</b> such that BT's STM-16 may not be used for the transmission of any information supporting drone strikes in Yemen or any other territory where there is no declared armed conflict or for illegal mass surveillance purposes;</li> <li>• <b>Provide Reprieve with clear evidence documenting:</b> <ol style="list-style-type: none"> <li>a) BT's policy in relation to contracts for support of US counter-terror operations, particularly those related to the use of weaponised drones, including any risk assessment policy in respect of complicity in violations of international law;</li> <li>b) The human rights due diligence carried out prior to entering into the Contract, as required by the OECD Guidelines; and</li> <li>c) Any efforts made to seek to prevent or mitigate the adverse human rights impacts to which BT is contributing;</li> </ol> </li> <li>• <b>Put in place appropriate mechanisms to mitigate and remedy the human rights violations in Yemen</b> to which it has contributed; and</li> <li>• <b>Issue a transparency report</b> on the extent of BT's cooperation with intelligence agencies to facilitate mass surveillance of its customers and <b>any due diligence efforts undertaken on this issue.</b></li> </ul>	<p><i>Privacy International v 6 Telecoms (submitted in 2013)</i></p> <p>Privacy International is <b>asking the telecommunications companies to:</b></p> <ul style="list-style-type: none"> <li>• <b>Explain all steps taken to oppose, resist or challenge</b> requests or directions to facilitate GCHQ's mass interception programmes, to the extent that the companies are being legally compelled to cooperate with GCHQ;</li> <li>• <b>Exhaust all legal avenues available to challenge</b> GCHQ's requests or directions to facilitate GCHQ's mass interception programmes, to the extent that the companies are being legally compelled to cooperate with GCHQ;</li> <li>• <b>Cease any voluntary compliance with GCHQ;</b></li> <li>• <b>Take measures to mitigate the respondent's contributions to the impact</b> of GCHQ's mass interception programmes on human rights; and</li> <li>• <b>Introduce policies ensuring all measures available are taken to resist requests from any government</b> that would result in mass interception that is contrary to the fundamental right to privacy.</li> </ul> <p>While other companies, such as Facebook, Google, Microsoft, and Yahoo! have pushed back against government surveillance requests, it appears that none of the fibre optic cable companies pursued any available legal avenues to protect the rights of their customers. Privacy International hopes that the British National Contact Point (NCP) <b>will investigate what steps the companies took to participating in these surveillance programmes and help ensure stronger steps will be taken in the future to fulfil its responsibilities under the Guidelines.</b></p>	<p><i>Privacy International v Gamma (submitted in 2013)</i></p> <p>Expectations towards company</p> <ul style="list-style-type: none"> <li>• Gamma should <b>cease relations with Bahrain, revoke software licences, deactivate relevant</b> copies of the FinFisher programme or devices so far as possible, to disenable use of those products in Bahrain,</li> <li>• Gamma should <b>implement a policy banning the export of FinFisher products to repressive regimes</b> and/or countries that are known to perpetrate human rights abuses.</li> <li>• Gamma should implement and publish a <b>general human rights policy.</b></li> <li>• Gamma <b>should be transparent about their clients</b>, and disclose the existence of all contracts to supply FinFisher products to foreign governments.</li> <li>• Where Gamma identifies that it has caused or contributed to adverse human rights impacts, it <b>should establish or participate in effective operational-level grievance mechanisms</b> for stakeholders who may be adversely impacted by its activities, in order that grievances may be addressed early and remediated directly.</li> <li>• Gamma <b>should integrate security mechanisms</b> into the technologies and products it develops to prevent their misuse.</li> </ul> <p>We furthermore request the NCP to:</p> <ul style="list-style-type: none"> <li>• <b>Investigate whether or not Gamma supplied and maintained</b> its FinFisher products for use by Bahraini authorities.</li> </ul> <p>If the company's involvement is verified:</p> <ul style="list-style-type: none"> <li>• <b>Give a final statement citing the breaches of the OECD Guidelines by Gamma in detail.</b></li> <li>• <b>Give recommendations to the company to avoid breaches of the OECD Guidelines.</b></li> <li>• <b>Make follow-ups concerning the compliance with the given recommendations</b> at appropriate time intervals.</li> </ul>

It is a core expectation in these complaints that companies transparently engage and disclose their human rights due diligence as it challenges the silent complicity of companies servicing controversial and allegedly illegal state security activities and arrangements.<sup>75</sup> Thus the telecoms and IT complaints have a broader objective than that of remedy for identified victims. One of the objectives in filing the telecoms and IT cases was to have the NCP make a statement that could serve for guidance as regards the conduct and responsibilities expected of companies in these sectors when their services and products are used in state security arrangements and programmes.<sup>76</sup> The NCP, however, refused to do so because it states,

*'The NCP process is not intended to initiate a wider examination of the sector in question, in this case, the due diligence of all companies operating in this sector in relation to interception requests. This would be outside the scope of the NCP process as envisaged in the Guidelines.'*<sup>77</sup>

Complainants in the telecoms cases, however, have shown that resisting government surveillance requests is not unusual and that there have been positive examples of companies challenging the demands of government for access to data.<sup>78</sup> Furthermore, the debate has risen to the international level. In a June 2014 report on the right to privacy in the digital age, the Office of the UN High Commissioner on Human Rights describes the relevance and applicability of the UNGPs in the IT and Telecoms sector observing that:

*'Where enterprises are faced with government demands for access to data that do not comply with international human rights standards, they are expected to seek to honour the principles of human rights to the greatest extent possible, and to be able to demonstrate their ongoing efforts to do so. This can mean interpreting government demands as narrowly as possible, seeking clarification from a Government with regard to the scope and legal foundation for the demand, requiring a court order before meeting government requests for data, and communicating transparently with users about risks and compliance with government demands. There are positive examples of industry action in this regard, both by individual enterprises and through multi-stakeholder initiatives.'*<sup>79</sup>

Therefore, in contrast to the UK NCP's perspective, international expectations about human rights due diligence in business relationships between a company and a state require that companies carry out more than general level due diligence.<sup>80</sup>

### 5.2.2 Common issues in the extractive sector – complainants' objectives

Six complaints were filed which concern allegations of human rights abuses by extractive companies.<sup>81</sup> The three complaints against the banks were also related to their investment in an extractive project. All of these complaints come from people affected by the extractives projects and seeking remedy for ongoing and prospective adverse impacts of the companies. In spite of their intrinsic differences, the cases share some similar allegations against the companies and similar expectations of the NCP. Table 2 offers excerpts from three complaints against extractive companies to illustrate their expectations.

As regards human rights concerns, these include:

- Adverse impacts on the livelihoods of local communities;
- The threat of resettlement without compensation;
- High level of pollution of water, air and soil that would require resettlement;
- Issues regarding access to water and food including access to fertile land and clean water sources;
- Issues of insecurity of local communities threatened by public security forces, and/or private security guards (except in *Crude Accountability et al v KPO Consortium*);
- Lack of engagement with local stakeholders;
- Absence of evidence of human rights due diligence;
- Use of stabilisation clauses in contracts and non-compliance with national laws.

Complainants' expectations of the NCP process include:

- Clear determination of companies' breaches of the human rights principles;
- Resolutions that provide adequate remedy and compensation for resettlement, the undermining of livelihood, and insecurity engendered by the presence of private security companies or public armed forces defending companies' property, roads, and concessions;
- Requirement of in-depth human rights due diligence beyond social and environmental impact assessments and arguments of social development;
- Disclosure of human rights due diligence;
- Requirement that companies use their investment leverage in their business relationships;<sup>82</sup>
- In two cases cessation of operations (*IAP and WDM v GCM and WWF v SOCO*).

Considering the severity of existing or prospective human rights harms ensuing from the operations of extractive companies, in two cases the complainants have asked that the projects or any related plans be terminated immediately. The demand was fulfilled in *WWF v SOCO* as the company agreed to do so, unless the DRC government and UNESCO agree that such activities are not incompatible with the World Heritage status of Virunga.<sup>83</sup> This is a landmark outcome whereby the oil company agreed to cease operations as a result of the mediation procedure and committed that it would never again jeopardise World Heritage Sites, and would undertake environmental and human rights impact due diligence.

The UK NCP, however, declared that it could not require that GCM ceased its operations in the *IAP and WDM v GCM* complaint.<sup>84</sup> It upheld this position even though the complainants had identified serious human rights risks in the project plan and a warning against the open-pit coal mine had been issued by seven UN Special Rapporteurs.<sup>85</sup> The complainants had a preventative and forward-looking objective of the complaint process. They sought to avert further gross violations of the human rights of people of Phulbari and adjacent districts.

Complaints against extractive companies and their investors arise from serious harms or future risks of serious harm. They usually come from communities that have struggled against companies operating in their neighbourhood because they have seen their livelihood and the environment they depend upon damaged without regard for the consequences. The harm suffered and the context of struggle preceding a complaint are challenging circumstances for mediation with little prospect of a conciliatory outcome. Often the NCP process will be taken up as a last recourse when trust between parties has already been deeply eroded or has collapsed. The case of *WWF v SOCO*, which has been held out as a successful mediation, is a positive exception.<sup>86</sup>

A common view among civil society is that the NCP complaint mechanism should offer a clear finding of any breach and an appropriate remedy. NCPs should also make the needs of victims and the improvement of their conditions a key consideration in their handling of complaints.<sup>87</sup> The following chapters illustrate how the outcome of the UK NCP process often falls short of these expectations.

### **FINDINGS 3: Objectives of complainants**

- Complaints are filed on behalf of both identifiable and non-specific victims and expect the NCP to take the needs of victims into account throughout the complaint process.
- Complainants seek determination from the NCP with a view to positively changing the conduct and operations of companies to improve conditions on the ground and also prevent ongoing or future abuses.
- Complainants expect the NCP to advise and make general statements on the applicability and implications of the Guidelines for specific business sectors.
- Complainants expect that the NCP process can encourage companies to implement and disclose their human rights due diligence beyond a general level.
- Some harms require a cessation of activities or contract.



- Some complaints expect companies to take a stand for human rights and use their leverage against the abuses of a state-client.

**Table 2 Partially Accepted Extractive Industry Cases: Objectives of complainants as submitted**

<i>IAP and WDM v GCM</i> (submitted in 2014)	<i>WWF v SOCO</i> (submitted in 2013)	<i>RAID and ACIDH v ENRC</i> (submitted in 2013)
<p>It is not possible to redesign the proposed Phulbari Coal Mine Project in such a way that the project would avoid mass evictions and further violations of the fundamental human rights of hundred of thousands of Bangladeshi citizens. This being the case, we consider that there is only one course of action that AEC/GCM should take to resolve the problem, which is to:</p> <ul style="list-style-type: none"> <li>• <b>Immediately halt all efforts to force the proposed project forward and activities related to the project;</b></li> <li>• <b>Withdraw or cancel the Scheme of Development</b> submitted to the GOB on 2 October 2005;</li> <li>• <b>Inform the appropriate Ministries and government officials in Bangladesh in writing of its decision to permanently terminate all project planning;</b> and</li> <li>• <b>withdraw from the project and from Bangladesh.</b></li> </ul> <p>Our objective in bringing the case is preventative and forward looking to avert further gross violations of the fundamental human rights of people living in the four adjacent sub-districts of Phulbari, Birampur, Nababgnaj and Parbatipur, whose fundamental rights are threatened by AEC/GCM's proposed Phulbari Coal Mine Project.</p>	<p>WWF contends that SOCO has violated multiple provisions of the OECD Guidelines in terms of both the project's design and its implementation to date. WWF alleges that:</p> <ul style="list-style-type: none"> <li>• <b>SOCO has failed to take due account of the need to protect the environment given DRC's commitments under the World Heritage Convention;</b></li> <li>• <b>SOCO has sought and/or accepted a contractual exemption that could unduly constrain the DRC Government's ability to protect human rights and the environment, and could be detrimental to the pursuit of sustainable development in Virunga;</b></li> <li>• <b>SOCO has failed to provide evidence that it has conducted appropriate and systematic HR DD;</b></li> <li>• <b>SOCO has failed to provide the public with adequate, measurable, verifiable and timely information about the potential social and environmental impact of its oil exploration activities.</b></li> </ul> <p>WWF request that the UK NCP facilitate a non-adversarial dialogue with SOCO to discuss how to bring the companies operations into line with the OECD Guidelines. It is WWF's estimation that this will require the immediate cessation of the company's current exploratory activities in and around Virunga.</p> <p>Should a mediated dialogue not result in a mutually acceptable resolution, we request that the UKNCP assess the allegations, determine whether a breach has occurred, and issue a final statement with recommendations as to how to improve the implementation of and compliance with the OECD Guidelines.</p>	<p>The complainants alleged that ENRC and its subsidiaries had:</p> <ol style="list-style-type: none"> <li><b>Failed to undertake environmental and social monitoring;</b></li> <li><b>Failed to implement a resettlement and compensation plan;</b></li> <li><b>Failed to establish security arrangements aligned with international standards;</b></li> <li><b>Failed to establish an effective dispute resolution mechanism.</b></li> </ol> <p>RAID and ACIDH's objective was with the help of the NCP to change ENRC's conduct towards affected communities on their concessions: in particular by:</p> <ul style="list-style-type: none"> <li>• <b>Immediately restoring the water supply</b> to the first village, and <b>undertaking environmental and social monitoring</b> there.</li> <li>• <b>Developing an artisanal mining strategy, ensuring security provision meets relevant standards, providing an effective dispute resolution mechanism for reporting security incidents.</b></li> <li>• <b>Implementing the resettlement plan for Kisankala village and retrospectively documenting compensation arrangements.</b></li> <li>• <b>Undertaking environmental and social monitoring</b> in the second village to <b>assess whether a resettlement plan is required.</b></li> </ul>

## 6 Analysis of case handling at the initial assessment stage

### 6.1 OECD criteria and UK NCP criteria for complaint handling

#### KEY INFO 4: OECD's overarching principles for handling complaints

The OECD has four overarching guiding principles for the handling of complaints under the Guidelines<sup>88</sup>:

Consistent with the core criteria for functional equivalence (i.e. coherence) in their activities, NCPs should deal with specific instances in a manner that is:

- **Impartial.** NCPs should ensure impartiality in the resolution of specific instances.
- **Predictable.** NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process including indicative timeframes, and the potential role they can play in monitoring the implementation of agreements reached between the parties.
- **Equitable.** NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example by providing reasonable access to sources of information relevant to the procedure.
- **Compatible with the Guidelines.** NCPs should operate in accordance with the principles and standards contained in the Guidelines.

The UK NCP bases its assessment of the merit of a complaint at the initial assessment stage on whether there is enough information to warrant further examination of the issues raised.

#### KEY INFO 5: UK NCP's initial assessment criteria

UK NCP procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises p.11-12<sup>89</sup>

##### 3.5 What does acceptance of a complaint at initial assessment mean?

If the NCP decides to accept the complaint, this means that it considers that there is enough information to warrant further examination of the issues raised with regard to the company's responsibilities under the Guidelines. It does not mean that the NCP has concluded that the Guidelines have been breached.

##### 3.6 What does rejection of a complaint at initial assessment mean?

If the NCP does not accept the complaint it means that it considers there is not enough information to warrant further examination of the issues raised with regard to the company's responsibilities under the Guidelines.

Under the OECD Guidelines' Procedural Guidance, NCPs are told that in making an initial assessment of the information available to determine whether the issue raised in a complaint merits further examination, they need to determine whether the issue is *bona fide* (which means made in good faith, without fraud or deceit) and relevant to the implementation of the Guidelines.<sup>90</sup> There are six criteria to be taken into account in making this determination including:

- whether the issue is material and substantiated; and
- whether there seems to be a link between the enterprise's activities and the issue raised.<sup>91</sup>

Thus, there are two separate questions, first whether the issue (i.e. the issue relating to the implementation of the Guidelines<sup>92</sup>) is 'material and substantiated', and second whether there 'seems to be' a link between the enterprise's activities and the issue raised – this being a lower threshold arguably requiring no more than *prima facie* evidence. This approach is confirmed by Dr Roel Nieuwenhamp, Chair of the OECD Working Party for Responsible Business Conduct, who is quoted in the OECD Watch 2015 report *Remedy Remains Rare* as saying that the '*material and substantiated*' standard was intended to prevent frivolous complaints without setting an unreasonable threshold for offering good offices.<sup>93</sup> OECD Watch summarises the position by saying that '*the substantiation standard in the Procedural Guidance ... should only require that factual allegations be plausible.*'<sup>94</sup>

## 6.2 Grounds of assessment

### 6.2.1 Rejected cases

Lack of substantiation of these crucial links has been variously cited in the rejection of the 15 cases.<sup>95</sup>

- In 14 cases, the NCP found that the allegation was not substantiated.<sup>96</sup>
- In nine of these cases, the NCP's rationale specifically stated that the link between the issue and the company's activities had not been substantiated.<sup>97</sup>
- In another five cases, the NCP found that the link between the issue and the company's obligations under the Guidelines had not been substantiated.<sup>98</sup>
- In 10 of the cases, the relevant link was not found by the NCP because the evidence submitted in support of the complaint was found inadequate or insufficient.<sup>99</sup>

Inadequate quality and source of information have been other important elements leading to the rejection of a case. This has been a particular problem in the cases involving the telecommunication companies which relied on limited sources of information which had either been leaked and destroyed, or which were available to the general public.

### 6.2.2 Partially accepted cases

In six cases where the UK NCP partially accepted a complaint, it considered that only some of the allegations merited further examination.<sup>100</sup> As in the 15 cases rejected at initial assessment, the NCP justified its decisions to focus only on certain aspects of the complaints on the basis that some of the allegations of a breach of principle cited were not substantiated. Therefore, already at the initial assessment stage, the UK NCP seems to require a very high degree of specificity in the evidence accompanying complaints.<sup>101</sup>

Generally the NCP looks for precise evidence of a link between a company's activity and the alleged issues. In the partially accepted cases, however, its justification to reject an alleged breach of principle from examination shows that it also expects the evidence to demonstrate and substantiate how this link engages each specific Guidelines paragraph cited in the complaint. As will be seen later in chapter 6.5, this suggests a selective approach from the NCP. This selectivity is underpinned by the interpretative room allowed by the language of the Guidelines and has had some critical implications for the complaint process. It has resulted in narrowing the scope of allegations in a way that excludes some of the most important issues raised in the complaints from mediation and/or examination.

## 6.3 Threshold of evidence at initial assessment

This section examines through case studies the reasons given by the UK NCP for rejecting complaints at the initial assessment stage for want of sufficient evidence.

### 6.3.1 Cases where the link between the activities of the company and the issue raised is not substantiated

As noted above, in nine of the rejected cases, the NCP has cited the reason for rejecting the complaint at initial assessment as being that the link between the activities of the company and the issue raised (in the complaint) is not substantiated. The case studies that follow illustrate the reasoning behind this.

#### **CASE STUDY 2: *Privacy International v 6 Telecoms Companies***

**Key facts:** the allegation was that press reports had implicated the companies in enabling access by UK government agencies to fibre optic cables and related infrastructure, allowing mass interception and indiscriminate collection of data by the government.<sup>102</sup> Thus the companies were said to have knowingly contributed to human rights violations (by the government).

**The NCP's initial assessment decision:** the NCP merged two of the criteria from the OECD Procedural Guidance by asking whether the link between the activities of the company and the issue raised was substantiated (rather than whether there 'seem[ed] to be a link between the enterprise's activities and the issue raised' and whether the issue raised under the Guidelines was material and substantiated),<sup>103</sup> thereby demanding a higher threshold of evidence than the Procedural Guidance asks for.<sup>104</sup> The NCP then concluded that the relevant link was not substantiated by the press report cited by the complainants.<sup>105</sup> The press report, articles in the Guardian and German newspaper *Suddeutsche Zeitung*, depended for their source on the contents of a document alleged to have been produced by the UK security services, which was one of the documents released by the whistle blower Edward Snowden. Although the NCP accepted that the journalist(s) had seen the document, and had reason to trust the source providing it, it was not satisfied that the link was substantiated in circumstances where the source document was not available to be viewed by either party to the NCP Complaint<sup>106</sup>. Thus the NCP rejected a credible press report on the grounds of the status of the source document, rather than any explicit doubts about the validity of the information.

#### **CASE STUDY 3: *Reprive v BT***

**Key facts:** the allegation was that telecommunications services provided by BT to a US military base in the UK enabled communications between this base and another US military base in Djibouti, supporting the operation of unmanned aircraft (drones) from Djibouti.<sup>107</sup> The alleged breach of the Guidelines' human rights provision was in relation to the impacts of the drone strikes on individuals and communities in Yemen.

**The NCP's initial assessment decision:** the NCP looked for evidence from the complainants of a 'specific link between the communications service provided and the human rights impacts of drone operations'.<sup>108</sup>

*'The claimants have not identified a specific link between the provision of the telecommunications service and the human rights impacts on Yemeni citizens complained of. The complainants' assertion that the service is likely to be used to support drone strikes appears to be based on the fact that it is provided to a US government agency and links to a base from which drones operate.'*

The Guidelines do oblige companies to employ due diligence appropriate to the nature of their goods and services, their business partners and the environments in which they operate. They also oblige companies to respect human rights whether or not these rights are protected by the relevant government, and to respond where they identify that their actions may contribute to or be linked to adverse impacts (including human rights impacts).’ (Emphasis added)<sup>109</sup>

As with the *Privacy v 6 Telecoms Companies* complaint, the NCP did not ask whether there was *prima facie* evidence of a link between the enterprise’s activities and the issue raised that needed further examination, but instead increased the evidential threshold to a requirement that the link be substantiated from the very beginning of the process. It found the link not to be substantiated in circumstances where the complaint asserted that the communications service between the two military bases was ‘likely to be used to support drone strikes’ given that Djibouti was the base from which drones operate (i.e. there was no direct evidence that the UK based communications service was used for this).<sup>110</sup> The NCP did concede, on the basis of the evidence, that BT had an obligation to do a ‘general level of due diligence’.<sup>111</sup> BT provided reports as evidence that it met this general due diligence requirement, and these appear to have been accepted without question by the NCP.<sup>112</sup>

### 6.3.2 Cases where the link between the company’s obligations under the Guidelines and the issue raised has not been substantiated

#### **CASE STUDY 4: SEW and Stroitel v Banks**

**Key facts:** the allegation was that three banks had business relationships with a Russian company operating an oil and gas production complex in Russia.<sup>113</sup> The Russian company was alleged to be acting inconsistently with the Guidelines through its impacts on local property owners. The UK banks A, B and C were accused of failing to comply with the responsibilities placed on them by the Guidelines to address impacts to which they were linked by a business relationship. Each bank had a different relationship with the Russian company.<sup>114</sup> Bank B was the purchaser of a company that arranged loans to the controlling shareholder of the Russian company. Bank C had an ongoing business relationship with the Russian company as one of a group of financial enterprises providing a Project Finance Facility for the construction and commissioning of the oil and gas production complex.<sup>115</sup> Bank C’s relationship to the Russian company was the closest of the three banks and the case against it was therefore the strongest of the three.

**The NCP’s initial assessment decision, Bank B:** The complaint against Bank B was dismissed because the complainants had not ‘*substantiated that [Bank B’s] link with [the Russian company] gave it an obligation under the Guidelines that was not met by the general policies it had in place.*’<sup>116</sup> The NCP decided this on the basis that Bank B was not able to influence the Russian company directly and that Bank B had general policies in place including its membership of the Equator Principles.<sup>117</sup> As will be discussed below in relation to Bank C, the company’s ‘defence’ was considered as part of the decision on whether there seemed to be a link that could be substantiated between the company’s obligations under the Guidelines and the issue raised.

**The NCP’s initial assessment decision, Bank C:** As with Bank B, the NCP decided that the evidence offered did ‘*not substantiate that UK Bank C has an obligation under the Guidelines to take action (beyond the arrangements to which the bank has already committed).*’<sup>118</sup> It reached this conclusion by examining the measures which Bank C had put in place to meet its obligations under the Equator Principles in respect of this particular business relationship.<sup>119</sup>

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The examples of Banks B and C illustrate how by evaluating the companies' 'defence' to a complaint, the NCP has gone beyond asking whether there seems to be a link between the enterprise's activities and the issue raised, to essentially determining the question that should be asked at the next stage of the process, namely whether or not the company is in breach of the Guidelines.

### CASE STUDY 5: *Reprieve v BT*

**Key facts:** the complaint was that BT was linked to the human rights impacts of US military operations in Yemen because it permitted UK and US intelligence agencies to intercept its customers' communications, from which these agencies derived intelligence that informed these military operations.<sup>120</sup> The earlier allegation about the communications cable between US military bases in the UK and Djibouti was repeated.<sup>121</sup> The NCP published two initial assessments – one in relation to BT's co-operation with intelligence agencies and the other in relation to BT's services provided to the US Defence Agency. As with the first complaint, the NCP was asked to accept evidence from press articles linking BT with the allegations.

**The NCP's initial assessment decision, *Co-operation with intelligence agencies:*** The NCP's conclusion was that the articles did not substantiate the company's link to the complaint because the source documents were not available to any party to the complaint.<sup>122</sup> It decided that the complainants '*have not substantiated an issue with regard to BT's obligations under the Guidelines.*'<sup>123</sup> Given the similarity between this decision and the decision in *Privacy v 6 Telecoms Companies*, it is not at all clear what the difference between a finding that the link between the company's *obligations* under the Guidelines and the issue raised is not substantiated, and a finding that the link between the *activities* of the company and the issue raised is not substantiated. In this case, unlike in the *SEW and Stroitel v Banks B and C* and *WWF v SOCO*, the NCP did not refer to the policies, due diligence etc which BT had put in place – as it had with the first in this series of complaints – it just rejected the complaint outright.

**The NCP's initial assessment decision, *Services provided to the US Defence Agency:*** the initial assessment did not contain findings about whether the press article was substantiated, but it rejected the complaint because none of the information offered by the complainants suggested that the BT cable was 'necessary' to drone operations.<sup>124</sup> It found that '*taking account of all the information noted above the UK NCP does not consider that Reprieve has substantiated an issue in relation to BT's obligations to address human rights impacts either of its activities or its business partnerships.*'<sup>125</sup>

### CASE STUDY 6: *WWF v SOCO*

**Key facts:** the complaint concerned oil exploration activities in the Virunga National Park in the Democratic Republic of the Congo and the risk of adverse impacts on the environment and local communities.<sup>126</sup>

**The NCP's initial assessment decision:** The case was partially accepted. The complainants' allegation that SOCO had not met its obligation under Chapter II, Paragraph 5 (to refrain from seeking or accepting exemptions not contemplated in law and relating to environmental or human rights issues) was rejected, the NCP finding that the stabilisation clause in the agreement between SOCO and the DRC government of itself did not substantiate any issue relating to the company's obligations under Chapter II, Paragraph 5.<sup>127</sup> The NCP

took account of SOCO's commitment to environmental and social standards 'above the requirements of existing laws'<sup>128</sup> in reaching this decision. As with the cases of Banks B and C, the company's 'defence' seems to have been considered at the initial assessment stage. One might query what additional evidence would have persuaded the NCP that the stabilisation clause '*substantiates an issue about the company's obligations under [the Guidelines]*' – would it have taken the invocation of the clause by the company in relation to a specific law or regulation to do so? This raises the problem of prospective human rights violations, which will be discussed below.<sup>129</sup> The NCP's lack of discernment between a state's ability to apply national laws regulating social and environmental standards and the company's commitment to abiding by such standards e.g. as contained in the OECD Guidelines is concerning: national laws arguably have a far higher normative value than a company's voluntary commitments. Relying on such commitments to mitigate the effects of the company's exemption, provided by the stabilisation clause, from laws and regulations made after the date of the contract with the DRC government, suggests an underlying faith in good corporate behaviour which could be seen as unwarranted.

In the *WWF v SOCO* case the NCP rejected an allegation that the company had failed to engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account (Chapter II, Paragraph 14).<sup>130</sup> It decided that the evidence put forward by the complainant to substantiate the allegation of defects in the consultation did not substantiate this allegation.<sup>131</sup> While not providing a reason for this decision, the NCP describes the evidence as being from 'unnamed sources',<sup>132</sup> indicating that for a source to be acceptable, the informant must be named. This is a high evidentiary burden to place on complainants, particularly those in cases where there are security / safety risks to informants. Rather than dismissing a case like this at the initial assessment stage, a fairer approach would be to make further enquiries at the second, substantive stage of the specific instance process to test the reliability of the accounts of the unnamed sources.

The NCP has taken a particularly tough line on adequacy of source or sufficiency of evidence in those cases involving telecoms companies, which relied on sources which had either been leaked and destroyed, or which were available to the general public. As noted above, in *Privacy v 6 Telecoms Companies* and the second case of *Reprieve v BT*, the NCP refused to accept credible press reports as being sufficient evidence without the complainants providing access to the sources of the information used by the relevant journalists. For instance, in its initial assessment of the *Privacy International v 6 Telecoms* complaints, the UK NCP stated:

*'The UK NCP accepts that the publication that made this report saw the document concerned and had reason to trust the source providing it, who had provided other information generally acknowledged to be genuine. The document (which appears to date from 2009) is not available to any party in the complaint, however, and the NCP also notes that none of the companies identified in the document appears to have been a party to it (i.e. it is reported to be an internal document and not a contract or other type of agreement). The NCP does not consider that this information substantiates a link between the activities of the enterprises identified and the issue raised.'*<sup>133</sup> (Emphasis added)

In the second *Reprieve v BT* case, the UK NCP stated in the second assessment:

*'The UK NCP's view about the information in the three articles is the same view it reached in the November 2013 complaint (see Paragraph 23 below). The UK NCP accepts that the source was considered genuine by the writers of the articles and provided other information generally acknowledged to be genuine. Because the source documents are not available to any party in the complaint, however, and because, as described, they are not documents to which the company identified was a party, the NCP does not consider the articles substantiate the company's link to the complaint.'*<sup>134</sup> (Emphasis added)

The position of the UK NCP in these complaints suggests that for evidence to be assessed as sufficient it needs to be available to all parties or the company must be a party to the document. Again the sufficiency of this type of evidence seems to be a matter for investigation at the second, substantive stage of the specific instance process rather than something that can be dealt with summarily at the initial assessment stage.

### 6.3.3 Additional burdens on complainants

One feature of the handling of complaints which has undermined the predictability and accessibility of the process is the placing of additional burdens on complainants at the initial assessment stage that go beyond any requirements of the Guidelines.

The *Reprieve v BT* case raises this concern. In its assessment of the third *Reprieve v BT* complaint, the NCP stated:

*'In making its new submission, Reprieve does not have any new direct knowledge of the company's link to the impacts, but relies on new information from generally available sources. Some of this information was generally available at the time of the original complaint. The UK NCP considers that a well-resourced NGO should be capable of identifying information relevant to allegations it makes. The UK NCP considers that Reprieve's failure to do this in the original complaint weakens its claim to have an interest in the matter.'*<sup>135</sup> (Emphasis added)

Here, the NCP made it clear that it has high expectations of complainants. As previously noted, the NCP appears to expect that the NGO itself should identify the link between the adverse impact and the company beyond doubt. But its reasoning also shows that the level of evidence it expects is relative to its estimate of the financial resources available to the complainants. Furthermore, the NCP appears to determine the level of interest of the complainant on the basis of the relevance and type of evidence submitted. Such statements and criteria undermine and contradict the criteria of accessibility set out in the OECD's Procedural Guidance.

## **FINDINGS 4: High evidential thresholds**

The NCP imposes high evidential thresholds on complainants at initial assessment, requiring them to:

- Show that the link between the activities of the company and the issue raised is substantiated;
- And / or show that the link between the company's obligations under the Guidelines and the issue raised has been substantiated;
- Have adequate sources and sufficient evidence; and
- On occasion, to meet additional evidential burdens.

## **6.4 Interpretation of Guidelines at initial assessment**

There are certain areas of interpretation which have been particularly problematic for the NCP. These are the notions of causing or contributing to adverse human rights impacts; being directly linked to a human rights impact by a business relationship; and due diligence. These areas of interpretation are each addressed in the following subsections.

### 6.4.1 Cause or contribute to adverse human rights impact

Both Chapter II Paragraph A11 and Chapter IV Paragraph 2 engage the notions of causing or contributing to adverse impacts and addressing those impacts when they occur. From the NCP's reasoning, however, these are particularly difficult to substantiate. For instance, Paragraph 2A11 was cited by complainants four times, rejected three times,<sup>136</sup> and accepted once.<sup>137</sup> Paragraph 4.2 was cited in six complaints and rejected five times as not substantiated.<sup>138</sup>



The test whether a company has caused or contributed to an adverse impact with regard to its responsibility to respect human rights appears to rest on whether the NCP can derive direct cause or contribution from the evidence submitted. Paragraphs 4.1, 4.2 and 4.3 of the Guidelines contemplate a number of different relationships that an enterprise may have to human rights impacts, that is: whether it is involved in the impact, caused or contributed to it, or linked to it by a business relationship.<sup>139</sup> The evidence provided by the complainant should therefore enable the NCP to ascertain whether the company is either involved with this impact (4.1), causes or contributes to the adverse impact (4.2), or is linked to it by a business relationship (4.3).<sup>140</sup> Reference to principle 4.1 seems less difficult to substantiate than the other two principles as this entails a more general idea of respect for human rights, as opposed to cause or contribution. A failure to meet the standards under 4.2 or 4.3 is necessarily a breach of 4.1. Indeed, the NCP altered the angle of some complaints to focus on 4.1 rather than 4.2 because the companies were not yet in operation or their products were not used to commit abuses (see Case Study 8).<sup>141</sup>

Nevertheless, the Guidelines Commentary for principle 4.2 appears less strict on the need to establish a direct link between a company and an adverse human rights impact. It states,

*‘Paragraph 2 recommends that enterprises avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. ‘Activities’ can include both actions and omissions. Where an enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise contributes or may contribute to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.’ (Emphasis added)*

The emphasis highlights the use of ‘may cause’ and ‘may contribute’ which the NCP seems to have overlooked in its assessment of cases.

The *Crude Accountability et al v KPO Consortium and Lawyers for Palestinian Human Rights v G4S* complaints illustrate the stance taken by the NCP in interpreting the ‘cause or contribute’ test.<sup>142</sup>

### **CASE STUDY 7: *Crude Accountability et al v KPO Consortium***

**Key facts:** The case concerns environmental and social impacts of an oil and gas facility on a village in Kazakhstan.

**The NCP’s initial assessment decision:** The NCP found that two households from the village were located in the facility’s sanitary protection zone and had not been re-settled despite their legal entitlement to this.<sup>143</sup> The complainants alleged a breach of Chapter IV Paragraph 2 (causing and contributing to adverse human rights impacts). The NCP decided however that the consortium only had obligations to the households under Chapter IV Paragraph 3 (human rights impacts directly linked to their business operations), seemingly because the obligation to re-settle under Kazakh law fell to the state not the company.<sup>144</sup> This misses the point, however, that the human rights impact – i.e. the environmental and social impact on the households – was caused by the consortium. The fact that the state was obliged to mitigate that impact by resettling the households does not change the nature of the human rights impact. This is important because while Paragraph 2 tells companies to avoid causing or contributing to adverse human rights impacts and to address such impacts when they occur, Paragraph 3 is weaker, telling companies to ‘seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations ...’.

### **CASE STUDY 8: *Lawyers for Palestinian Human Rights v G4S***

**Key facts:** The case is about the provision of security equipment and services by G4S to the state of Israel for use in certain government facilities and operations, each of which is said to operate in breach of international human rights law.<sup>145</sup> The type of equipment is baggage scanners and metal detectors (used at the separation barrier constructed in the West Bank area and the Erez crossing between Israel and the Gaza Strip) and security systems, access control and public address systems (used in prisons).

**The NCP's initial assessment decision:** The NCP rejected at the initial assessment the allegation that the company's equipment was being used to commit human rights violations, or that servicing or maintaining the equipment made a substantial contribution to such violations being committed.<sup>146</sup> It therefore concluded that the complainants had not substantiated an issue with regard to the company's obligations under Chapter IV Paragraph 2, to avoid causing and contributing to a human rights impact. This excluded from the scope of mediation<sup>147</sup> and/or the NCP's examination of the matter the issue at the heart of the complaint, namely, whether providing these facilities and services for use in a situation where human rights are violated was consistent with the Guidelines. While it could not be said that, for example, anything done by G4S was directed at child prisoners (whose human rights were allegedly violated in the prisons), by providing the equipment necessary to run the prison, G4S was arguably making a direct contribution to the violations of the child prisoners' human rights. The test of 'substantial contribution' applied by the NCP is quite different to that found in the Guidelines ('may contribute') in a way that disadvantages complainants. As with the Crude Accountability complaint, the NCP did find that LPHR had substantiated an issue with regard to the company's obligations under Chapter IV Paragraph 3 – giving rise to weaker obligations to mitigate the adverse impact – referring to the company's business relationship under the contracts to provide its facilities and services.<sup>148</sup>

#### **6.4.2 Directly linked by a business relationship**

Chapter II Paragraph A12 and Chapter IV Paragraph 3 engage the notion of seeking to prevent or mitigate an adverse impact where a company has not contributed to that impact, but the impact is nevertheless directly linked to its operations, products or services by a business relationship. The UK NCP has interpreted the requirements of these principles in inconsistent ways. A striking example is the different treatment of the *Privacy International v Gamma* complaint and the *Reprieve v BT* complaint.

### **CASE STUDY 9: *Privacy International v Gamma***

**Key facts:** In the case, the allegation was that the company supplied 'malware' products to the Bahrain authorities which allowed them to intercept private correspondence and conversations between pro-democracy activists. The activists were subsequently detained and tortured. Gamma refused to confirm whether its products were being used in Bahrain.

**The NCP's initial assessment decision:** Despite the inconclusive evidence of a link between the company and the alleged adverse impact of its product through its use by the Bahrain government, the NCP accepted that there may have been a link between the product and its use against the activists and interpreted the Guidelines as meaning that this was sufficient for it to accept and examine the case.<sup>149</sup>

In the *Reprieve* complaint concerning services to the US Defence Agency, however, the NCP interpreted the Guidelines as requiring conclusive evidence of a link between the company's product or service and the alleged adverse impact by the US Defence Agency. The NCP did not find sufficient evidence of a link between the company and the alleged adverse impact of its product because none

of the information offered by the complainants suggested that the BT cable was necessary to drone operations.<sup>150</sup> Admittedly there is a difference between the Privacy and Reprieve cases in that the malware in the Privacy case is a product with inherent human rights risks while the fibre optic cable in the Reprieve case is a general product which has many innocent uses. What heightened the risk of human rights impacts in the Reprieve case however was the use of the fibre optic cable in communications between two US military bases, one of which was used for the launch of drone strikes. As discussed above, this did not persuade the NCP to accept the complaint for examination on the basis of the link by a business relationship between the company's products or services and the human rights impact, in contrast to the more flexible approach it adopted in the Privacy case.

The NCP has taken a conservative approach in interpreting the Guidelines on 'business relationship' in the finance sector. As noted above, the OECD Global Forum on Responsible Business Conduct (GFRBC) addressed this question after the *SEW and Stroitel v 3 Banks* complaint was rejected. The position of the GFRBC is that in principle a minority shareholding can be seen as a business relationship.<sup>151</sup> Thus it took a different stance from the NCP, which rejected the complaint against each of the banks. The complaint against Bank A, for example, which was a bank linked to the Russian oil and gas company only as a member of a syndicate of 20 banks which loaned money to the Russian company's controlling shareholder, was dismissed for want of a direct link between Bank A and the Russian company.<sup>152</sup> The NCP seems to have interpreted the word 'direct' (directly linked to its operations etc) literally, rather than taking the approach advocated not just by the GFRBC, but also by the Office of the United Nations High Commissioner for Human Rights. The latter, in Interpretative Guidance on the UNGPs, confirms that business relationships 'include indirect business relationships in [a business enterprise's] value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.'<sup>153</sup> Value chain is defined as 'the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which ... supply products or services that contribute to the enterprise's own products or services.'<sup>154</sup>

### 6.4.3 Due diligence

Chapter II Paragraph A10 and Chapter IV Paragraph 5 introduce the notion of human rights due diligence. In the first *Reprieve v BT* complaint the NCP decided that BT had an obligation to do a 'general level of due diligence.'<sup>155</sup> The expression 'general level of due diligence' is not found in the Guidelines<sup>156</sup> or the UNGPs.<sup>157</sup> The use of this device seems to be to allow the NCP to acknowledge that BT has some policies in place without actually examining such policies in detail to see whether they address the particular human rights impact at the heart of the complaint – the use of fibre optic cable in a way that potentially violates international human rights law, e.g. drone strikes. This broader interpretation has a procedural impact which could be viewed as a partial assessment of evidence, a point discussed below in section 10.2.

## **FINDINGS 5: Linking companies to human rights violations**

The UK NCP makes it particularly difficult for complainants to substantiate that companies have 'caused or contributed' to adverse human rights impacts. It has been rather inconsistent in how it requires complainants to substantiate that companies are 'directly linked by a business relationship' to adverse human rights impacts. On due diligence, the UK NCP distinguishes between general and other levels of due diligence, which is not supported by the text of the Guidelines.

## 6.5 Selective approach – implications for scope of mediation and examination of complaints

The selective attitude of the NCP is reflected in its decisions to restrict the focus of its examination to specific principles and aspects of the eight partially accepted complaints. The consequence of examining only those principles which it finds to be best substantiated is to exclude from examination some alleged adverse impacts which were essential components of the complaints. This section focuses on two of these cases – *IAP and WDM v GCM* and *RAID and ACIDH v ENRC*.

### 6.5.1 Selectivity and restricted scope of examination in IAP and WDM v GCM

#### **CASE STUDY: 10 IAP and WDM v GCM**

**Key facts:** The complaint concerns the inevitable and serious adverse impacts on human rights, ecosystems, and water and food resources should the project of an open-pit coal mine go forward in this highly populated and agricultural region in Bangladesh. These adverse impacts are well documented and underpin the ongoing struggle of resistance and opposition started in 2006 against the project in Bangladesh and internationally.<sup>158</sup>

The Phulbari case (complaint by IAP and WDM against GCM) has attracted attention because of the NCP's approach to the serious concerns it raised.<sup>159</sup> Specifically, the NCP restricted the scope of examination of human rights impacts to a narrow timeframe covering the period between 1 September 2011, when the NCP started to apply the 2011 Guidelines, and the filing of the complaint (21 December 2012).

Since 2006, however, the development of the project has been suspended and remains uncertain. GCM has only been able to pursue the controversial promotion of its project and has not started developing the open-cast mine. The NCP thus deduced that although the evidence submitted by the complainants established potential adverse impacts, they did not establish that the impact could not be avoided or mitigated.<sup>160</sup> The NCP relied on the word of the company which affirmed that its plans would enable it to avoid and fully mitigate its adverse impacts.<sup>161</sup> Furthermore, within the restricted timeframe of examination no impact due to the mining operations had yet occurred, and the NCP refused to examine the potential future impact of the mine.<sup>162</sup>

As a result of the narrow timeframe, the NCP further restricted the scope of examination to focus on allegations related to Guidelines paragraphs which have a more general and self-regulatory outlook, i.e. Chapter II Paragraphs 2 and 7, and Chapter IV Paragraphs 1 and 5. In other words, the grounds of examination set in the initial assessment solely focused on whether the company's plans for developing the mine included:

- Adequate measures and processes to engage with and consult local communities to foster their trust;
- Appropriate human rights due diligence to address its impact which meet self-regulatory standards and Guidelines responsibilities.<sup>163</sup>

The decision to restrict the scope of examination of the complaint to these principles and responsibilities may be related to the view that the complaint mechanism privileges dialogue and negotiated resolutions between parties. In this case, the complainants were looking for a determination from the NCP and required that the company ceased its project, an expectation which the NCP found beyond its remit. It might also be based on the belief that the presence of a business and its local investments are seen as inherently good for sustainable development and that withdrawal should be the last resort where all mitigating measures have failed. The UK NCP states that it '*believes that in general the Guidelines promote an approach of enterprises engaging where they can do so responsibly, rather than minimising their risks by avoiding particular countries or projects.*'<sup>164</sup> Hence, the NCP opined that it did not have the power to mediate the withdrawal of a company from the project as required by the complainants in this case.<sup>165</sup>

In the complainants' view, the UK NCP's decision to focus mainly on issues of communication with stakeholders and human rights due diligence indirectly signalled that the UK government gave its green light to the project despite the inevitable adverse impacts on human rights, ecosystems, and water and food resources.<sup>166</sup> In its September 2015 follow-up statement, the NCP reiterated the view that the company would need to produce its human rights impact assessment and pursue its engagement with stakeholders before the project could start.<sup>167</sup> Despite the clear opposition and resistance to the project in Phulbari and indications from the government of Bangladesh that an open-cast mine is not welcome anymore,<sup>168</sup> the UK NCP states that it has '*no basis for finding GCM's actions inadequate or inappropriate to this "nature and context of operations"*'.<sup>169</sup> This reasoning seems inconsistent because without the publication of a detailed human rights impact assessment by GCM, the NCP does not have any basis to find that the company's plans are adequate and appropriate.

### **FINDINGS 6: Restricting scope of complaint**

The limited timeframe adopted by the NCP restricted the scope of examination to aspects of the complaint that were peripheral and which only partly addressed the most fundamental issue of the viability and sustainability of an open-pit mine of that scale in that territory.

The selectivity of the assessment effectively reduced the complainants' concerns about gross and inevitable impacts on the basic human rights of tens of thousands of people, including indigenous people, and about the high risks of conflict in the area, to problems of self-regulation as regards the company's general respect of human rights, due diligence, and communication with local communities.

## **6.5.2 Selectivity and restricted scope of mediation in RAID and ACIDH v ENRC**

### **CASE STUDY 11: RAID and ACIDH v ENRC**

**Key facts:** The case concerns the impoverished populations of Kisankala village and Lenge village, located on two mining concessions in Katanga province controlled by companies associated with ENRC. Kisankala's only clean water supply was in disrepair for nearly a year from July 2012 following clashes between security guards and artisanal miners. RAID's complaint alleges that these clashes were triggered by actions by security guards to remove artisanal miners from the concession.

The complaint also addresses questions about resettlement and compensation for dispossessed villagers and the alleged absence of environmental and social monitoring, particularly for Lenge. In addition, private security guards operating at the sites are said to have engaged in human rights abuses.

The scope of the *RAID and ACIDH v ENRC* complaint has also been significantly curtailed at initial assessment. The UK NCP accepted for further examination some of the issues related to the prime objectives of the complaint. These include addressing the relationship between the control which the company exercises over the supply of clean drinking water and its security arrangements relating to artisanal miners in the village of Kisankala, and issues of inadequate communication with the village of Lenge. Both villages are within the mining concessions.

The NCP, however, did not find that the evidence provided substantiated issues in relation to resettlement and environmental monitoring because they did not establish a link between the company's recent and current mining activities and their impacts on the villages. The NCP's views were that those issues raise obligations for companies only if and when they are related to companies' own recent or current mining activities.

This narrow definition of obligations altered the angle of the complaint to focus on paragraph 4.1 which engages the notion of respecting human rights rather than paragraph 4.2 which entails the notions of cause, or contribute to violations and address human rights impacts.<sup>170</sup> Furthermore, the NCP rejected in their entirety the aspects of the complaint related to Chapter V on environmental impacts. In so doing, it ignored the fact that when acquiring assets new investors also normally take over responsibilities for their liabilities which, in this case, include the long-standing adverse environmental impacts of the subsidiaries acquired in 2012.<sup>171</sup>

This restricted scope meant that the NCP ignored and excluded from mediation all the other impacts of the company's activities on the livelihoods and basic human rights of the villagers within the boundaries of the concessions. For instance, the people of Lenge, a village situated deep inside the concessions, do not enjoy reasonable access to the main highway. This considerably restricts their ability to sell their produce and earn a living, or reach health centres in cases of emergency. The villagers of Kisankala, the other village which was the subject of the complaint, are constantly disrupted by vehicles entering and leaving the nearby compound. The traffic creates a major dust problem and makes the dirt track leading to the village virtually impassable, particularly in the rainy season. In turn, this hinders the economic activity and sustainability of the people of Kisankala, and restricts their access to health centres.<sup>172</sup>

### **FINDINGS 7: Addressing real impacts in real time**

These cases show that the inclusion of a chapter dedicated to human rights principles in the Guidelines requires that the NCP adopts a more contextual approach attuned to the legitimate concerns and needs of people affected or who are at risk of becoming adversely affected by the activities of companies.

The Guidelines have a prospective and preventative scope, and human rights concerns do not always emerge from the direct and immediate actions of a company.

## 7 Mediation

### 7.1 Overview

Following the 2011 update of the Guidelines increasing emphasis has been placed on mediation and the preferred outcome of any complaint from the UK NCP's and the OECD's perspective is an agreement between the parties:

*'The benchmark of success is the ability of NCPs to facilitate mediation and dialogue and stakeholders are beginning to appreciate this non-judicial grievance mechanism.'*<sup>173</sup>

The UK government has long recognised that mediation requires specific expertise and qualifications. Since 2008 it has been the practice of the UK NCP to appoint external, professional mediators to facilitate dialogue between the parties to a complaint rather than to conduct the mediation themselves, as is the practice among the majority of other NCPs.

In the UK, if the parties come to an agreement through mediation, the NCP publishes its report and closes the case. If mediation fails the NCP carries out an examination of the case to assess whether the multinational enterprise has breached the Guidelines. Other NCPs refuse to conduct such an examination, but draw up recommendations on the future conduct of the company. Some NCPs will simply reject complaints if either of the parties is unwilling to enter into mediation.<sup>174</sup>

Improving mediation skills is a high priority for NCPs.<sup>175</sup> To this end, since 2010 the OECD and adhering governments have organised seminars and workshops with mediation experts.<sup>176</sup> The UK NCP, together with the Dutch and Norwegian NCPs, commissioned a manual on mediation from the US-based, Consensus Building Institute (CBI), that specialises in negotiation and dispute resolution.<sup>177</sup> NCPs are now encouraged to consider themselves as *'informal problem solvers in corporate responsibility disputes'*.<sup>178</sup> The NCP Manual informs the UK NCP's approach to complaints:

*'Problem solving through mediation can yield more positive results than a formal findings process. The latter might not prompt constructive action by the corporation. Moreover, the findings process focuses narrowly on producing findings that the NCP can substantiate; it does not seek to improve relationships among the affected parties in an effort to head-off future disagreements.'*<sup>179</sup>

Since 2011, six complaints have been referred by the UK NCP to mediation, two of which have ended in agreements.<sup>180</sup> The UK NCP has been more successful than most NCPs in bringing reluctant parties to the negotiating table in part by its willingness to exert pressure. The Formula One Group, for example, was slow to respond to the complaint and it was only after the UK NCP made clear that it might decide to assess the complaint on the basis of the information that it had already received that Formula One engaged in the process.<sup>181</sup>

#### **Case study 12: Americans for Democracy and Human Rights in Bahrain v Formula One Group**

The Bahrain Grand Prix has been staged nine times since 2004, but was cancelled in 2011 after pro-democracy protests were crushed.<sup>182</sup> In April 2013, the All-Party Parliamentary Group for Democracy in Bahrain wrote to the F1 boss Bernie Ecclestone calling on him to cancel the race.<sup>183</sup> In June 2014 a complaint was brought by Americans for Democracy and

Continued over »

Human Rights in Bahrain (ADHRB) seeking to require that the companies disclose and discuss their human rights due diligence and noted that this should happen before the next Bahrain Grand Prix took place (April 2015). In its Initial Assessment the NCP dismissed most of the allegations against the companies: *‘the fact that the companies promote a high profile event that attracts protests does not itself link them to alleged abuses of protestors (or suspected protestors)’*. But the NCP accepted that the risks involved in holding future Grand Prix events in Bahrain meant that the companies ought to undertake human rights due diligence and to develop and communicate a human rights policy.<sup>184</sup> The parties agreed to enter into mediation and as a result the Formula One Group agreed ‘to strengthen its processes in relation to human rights’ and drafted its first ever human rights policy.<sup>185</sup>

## 7.2 UK NCP’s good offices

Apart from mediation, the UK NCP can also offer its good offices to help the parties involved resolve the issues outside of the OECD process. The only known example of the UK NCP providing ‘good offices’ occurred outside the time parameters of this study.

### **CASE STUDY 13: European Centre for Constitutional and Human Rights (ECCHR) v Cargill Cotton Limited**

Between October and December 2010, ECCHR and partner NGOs brought complaints to NCPs in the UK, France, Switzerland and Germany alleging that cotton wholesalers who directly or indirectly purchased Uzbek cotton harvested through forced labour of children and adults were in violation of the OECD Guidelines. The UK NCP handled the complaint brought by ECCHR against Cargill Cotton Limited and using its good offices facilitated a conciliation meeting in London. ECCHR and Cargill agreed to keep each other informed and exchange views on a regular basis and to meet after 12 months to review progress against the undertakings the company and other cotton traders had given to resolve the issue. In June 2011 the NCP issued a brief statement and concluded the case. But once the conciliation ended and the media coverage had slowed down, the commitment of the cotton traders gradually decreased and all ECCHR’s suggestions for effective engagement were ignored.<sup>186</sup> ECCHR was forced to cease cooperation with cotton traders after the one-year implementation phase. At that time the UK NCP only published a follow up statement where a final statement included recommendations, or where an agreement between parties provided for it. ECCHR was not made aware of this possibility and, in the absence of a recommendation to monitor the agreement, no further action was taken. So the UK NCP lost an opportunity to help hasten a change in corporate conduct and improve respect for human rights in Uzbekistan.

## 7.3 Evaluation of the mediation process

In most cases mediators have been praised for being impartial and professional, but in a minority of cases concerns have been expressed by complainants about the way the mediation has been conducted.

### 7.3.1 Delays

There have been lengthy delays with mediations with deleterious consequences for the communities involved. In the *RAID and ACIDH v ENRC* case, there was a nine-month delay before mediation started. Similarly in the KPO consortium complaint, while the UK NCP has been commended for its handling of the case, Crude Accountability has expressed its disappointment with how long the process has taken. The complaints were filed in June 2013 and it took a year for the UK NCP to bring the parties together for their first meeting.<sup>187</sup> In both cases there were various reasons for the delays which included the parties’ scheduling difficulties, the limited availability of the



mediator, and the NCP's heavy caseload, which was compounded by staff turnover. But the loss of momentum not only risks undermining the effectiveness of the mediation, it also leaves the affected communities struggling to cope with problems that remain unaddressed or may even be worsening.

### 7.3.2 Lack of preparation

The NCP Manual stresses the importance of preparatory work by the mediator before the mediation begins. But this does not always happen in UK-facilitated mediations, possibly because of a lack of resources. The ECCHR, a German NGO (and co-complainant), though favourably impressed with the UK NCP's handling of its complaint against Gamma International, criticised the mediator's lack of preparation:

*'Unfortunately, the mediator missed the opportunity to contact the parties before mediation in order to clarify any questions in advance, check the expectations of the parties and to agree on an agenda. However, these issues are most important for the preparation of an effective meeting. In fact, the expectation of both parties regarding the agenda of the meeting differed substantially.'*<sup>188</sup>

WWF raised similar concerns regarding the preparation of their mediation with SOCO.<sup>189</sup>

### 7.3.3 Reducing imbalance between the parties

There is a marked absence of measures to encourage or assist the participation of local NGOs or community representatives in the UK mediation process. One NGO observed:

*'The UK NCP appears to operate in a fairly legalistic way that would be extremely difficult for a local community to engage in without assistance.'*<sup>190</sup>

Both the Dutch and Norwegian NCPs have been willing to provide additional assistance to poor complainants to help redress the inequality of negotiating power between the parties.<sup>191</sup> In deciding whether a complaint should go to mediation, the NCP Manual advises NCPs to go beyond the standard desk review of the information provided by the complainants when complaints are initially not well substantiated for reasons that are not necessarily related to the legitimacy of the claim:<sup>192</sup>

*'For example, poor, vulnerable stakeholder groups may find it difficult to obtain the necessary evidence to substantiate their claims. In other cases, some parties may fear that providing such evidence could leave them vulnerable to retaliation from their employer or the community. In such instances, an NCP might make an effort to seek advice from relevant sources, such as industry or media reports. This would require the NCP to go beyond the standard desk review of the information provided by the complainant. Several NCPs already do this.'*<sup>193</sup>

### 7.3.4 Undermining trust in the neutrality of the mediator

Serious concerns about alleged breaches of the mediation procedures by the UK NCP have been raised. In one case, mediation broke down when agreement could not be reached. The company then alleged that the complainants had not engaged in good faith and tried to obtain notes to that effect from the mediator. In an apparent breach of the procedures the UK NCP at the company's instigation asked the mediator to provide details of the confidential sessions.<sup>194</sup> This risked compromising the neutrality of the mediator. The behaviour of the UK NCP appears to be incompatible with the procedures, which make clear that mediation needs to be informal and confidential, in order to encourage open discussion and to help the parties *'come to mutually agreed resolution without undue delay'*. The NCP may receive progress reports at regular intervals but no minutes are to be taken and the mediation agreement is supposed to be the only record of what happened.<sup>195</sup>

### 7.3.5 Human rights: lost in mediation

The UK NCP's focus on 'problem-solving' may lead to the rejection of politically sensitive cases or to failing to examine critical or complex aspects of complaints that are not amenable to amicable settlement.

Even in the WWF-SOCO case, frequently cited as an example of the effectiveness of the NCP procedures, the NCP demonstrated its inability to grasp the human rights issues at the heart of the complaint. Nevertheless, this 'landmark agreement' appears to have led SOCO to cease operations and not to renew its licence within the Virunga National Park.<sup>196</sup> WWF's complaint was part of a larger campaign to raise the public profile of the threat to the World Heritage Site. From the perspective of forcing the company to halt its operations in the site, the outcome was successful. But the outcome of the complaint brought against SOCO brought no resolution to the allegations of the human rights abuses that had been made in relation to the company's activities, or those of people linked to it. Despite widespread reports of human rights violations allegedly connected to SOCO's activities, the UK NCP by narrowing the scope of mediation and rejecting information from anonymised sources (a precaution which is recognised under the procedures as being at times a necessity)<sup>197</sup> ignored the company's past failure to conduct due diligence or engage with the communities living inside the Virunga National Park.<sup>198</sup> In its preliminary 2014 results statement, SOCO announced that it had appointed its own solicitors, Clifford Chance, to look into the allegations of wrongdoing made by various NGOs and media outlets. But the terms of reference for the review are not public and SOCO has made no commitment to publish the results.<sup>199</sup> So instead of an examination under the NCP, human rights questions have been left to a private investigation over which the company exerts complete control and for which there is no public accountability.

## 8 Determination of breaches

### 8.1 Definition of breaches

There are relatively few cases since 2011 for which a determination of breach has been made, in total just three: *Privacy v Gamma*, *IAP and WDM v GCM* and *LPHR v G4S*, meaning that it is difficult to draw general conclusions about whether the NCP is making decisions that stand up to scrutiny under the Guidelines. This section examines the three final statements to draw out positive and negative examples of NCP decision-making.

What process is the UK NCP following when it makes a determination of breach? There is no definition of breach in the OECD Guidelines' Procedural Guidance.<sup>200</sup> The relevant part of the Procedural Guidance simply states that 'If the parties involved fail to reach agreement on the issues raised ... the NCP will issue a statement, and make recommendations, as appropriate, on the implementation of the Guidelines.'<sup>201</sup> The UK NCP has a process in place for examination of complaints, which is described in the box 'Key Info 6'. There is no definition of breach and no explanation of the evidentiary threshold to be met for the NCP to assess a complaint as justified.

#### KEY INFO 6: UK NCP procedure for examining complaints

UK NCP procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises p.17:

- 4.6.2 The objective of the examination is for the NCP to investigate the complaint in order to assess whether the complaint is justified.
- 4.6.4 The examination is likely to involve the NCP collecting further information or statements from the complainant or the company. It may also seek advice from other relevant government departments, UK diplomatic missions or overseas DFID offices, business associations, NGOs or other agencies. If appropriate it will seek informed independent opinion.
- 4.6.5 The examination may also involve further meetings between the NCP and the parties. In each case the meeting will have an agenda and be minuted.
- 4.6.6 In exceptional cases the NCP may consider it necessary to undertake a field visit. The NCP will seek to agree terms of reference for the field visit with both parties in advance of the visit. The NCP will share a report of the visit with both parties for their comment.

### 8.2 Threshold of evidence at 'determination of breach' stage

The *Privacy v Gamma* complaint shows a permissive approach to the threshold of evidence.<sup>202</sup> As with many of the allegations in ICT/telecommunications cases, the complainants in this matter were unable to prove that Gamma supplied malware to Bahrain or that the product had been used to identify people who were subsequently detained and tortured. On the question of whether the specific human rights abuses the complainant referred to could be verified, the NCP decided:

*'... the complaint makes a strong circumstantial case, principally based on a technical analysis of the product, on other accounts of people detained by the Bahraini agencies, media reports referring to use of interception by Bahrain state agencies, and Bahrain's 2009 Lawful Access Regulation.'*<sup>203</sup>

On the question of supply of Gamma's product to the Bahrain authorities, the NCP found:

*'Based on the information reviewed and shared by the UK NCP, the NCP considers that it is reasonably certain that the product reported by the activists as having been sent to them was Gamma's. The technical analysis offered by the complainants has not been challenged.'*<sup>204</sup>

On the basis of these pragmatic conclusions, the NCP decided that the company's approach was not consistent with the company's general obligations to respect human rights.

### 8.3 Interpretation of the Guidelines at 'determination of breach' stage

Certain incongruities in the NCP's interpretation of the Guidelines at this stage in the process are discussed in the case studies below.

#### 8.3.1 Case study - *LPHR v G4S*: the use of the word 'technical' has no basis in the OECD Guidelines or the UNGPs<sup>205</sup>

***LPHR v G4S* final statement March 2015**, pp. 3-4 and 18

##### **Summary of the conclusions**

From September 2011, the UK NCP considers that the company's actions are technically inconsistent with its obligation under Chapter II, Paragraph 2 to respect human rights. Similarly, the UK NCP considers that the company's actions are technically inconsistent with its obligations under Chapter IV Paragraph 1 to respect human rights.

In each case, the technical inconsistency arises because G4S is not adequately meeting a specific obligation that is included within the broad obligation. The UK NCP does not find any broad failure by G4S to respect the human rights of people on whose behalf the complaint is made.

The specific obligation that is not adequately met is the obligation under Chapter IV, Paragraph 3 to seek to address impacts of its business relationships. The UK NCP finds the company's actions inconsistent with its obligation under Chapter IV, Paragraph 3.

##### **Overall conclusions**

77. The obligation to address impacts is part of the overall obligations to respect human rights in Chapter IV, Paragraph 1 and Chapter II, Paragraph 2. Because of this, the inconsistency with Chapter IV Paragraph 3 makes the company's actions technically inconsistent with these provisions also. The UK NCP considers the inconsistency with Chapter IV Paragraph 1 and Chapter II Paragraph 2 to be a technical inconsistency because its finding on these paragraphs is based on their relationship to Chapter IV Paragraph 3. The UK NCP has not found any general failure by the company to respect the human rights of the people on whose behalf the complaint is made, or any failure to respect human rights in regard to its own operations.

The UK NCP seems to be implying that the obligation to respect human rights, meaning to avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved, should be separated into its two parts, and seems to shy away from finding G4S in breach of the totality of this provision. The Guidelines commentary on human rights explains that *'addressing actual and potential adverse human rights impacts consists of taking adequate measures for their identification, prevention, where possible, and mitigation of potential human rights impacts, and accounting for how the adverse human rights impacts are addressed.'*<sup>206</sup> Thus a

failure to address an adverse human rights impact is a so-called ‘general’ failure to respect human rights and should be acknowledged as such. There is no distinction in the Guidelines or the UNGPs between a ‘technical’ breach of the corporate responsibility to respect and a ‘broad failure to respect’ human rights. The introduction of these caveats to a finding that a company has not complied with the Guidelines is clearly in the company’s interest: this is borne out in the LPHR case by the G4S public statements issued after the publication of the final statement which focused primarily on the findings that there was no broad failure to respect human rights and that certain breaches were only technical.<sup>207</sup>

### 8.3.2 Case study – *IAP and WDM v GCM*: rejecting an allegation related to future harms<sup>208</sup>

The key allegation in this complaint is that by pursuing plans to develop an open pit coal mine at Phulbari in Bangladesh, GCM is failing to respect the rights of communities in that area. The development of the mine would entail mass population displacement. According to the company, it would not be possible to provide land-based compensation for the majority of the 40,000 people who would be displaced. The OECD Guidelines complaint concerned involuntary resettlement and impacts on local water sources, ecosystems, housing, food and livelihoods. Inadequate due diligence and consultation were alleged.

#### ***IAP and WDM v GCM* initial assessment June 2013, pp.8-9**

28. The complainants say that GCM knew (or should have known) that adverse impacts are inevitable if the mine proceeds. As noted at Paragraph 22 above, the NCP considers that the evidence establishes there are potential adverse impacts of the mine, but the company considers that its plans avoid or fully mitigate these. The NCP does not consider that there is a substantiated issue that by not withdrawing from the project, GCM has not avoided causing adverse impacts.

#### ***IAP and WDM v GCM* final statement p.18**

##### **Limits of the further examination**

73. In its initial assessment of the complaint, the UK NCP had noted that its remit did not extend to making an independent assessment of potential impacts. The NCP’s approach to information about potential impacts was therefore limited to deciding whether the company’s assessment was properly conducted and took appropriate account of its operating context from 2011 (when obligations to address potential impacts were added to the Guidelines). The NCP considers that provided the company properly performs its due diligence, it is entitled to rely on it to meet its obligation to address potential impacts.

The difficulty with the NCP’s interpretation of the Guidelines, cited above in the box, is that it means that no matter how severe they may be, potential impacts will not be considered by the UK NCP. This runs counter to the spirit of the revised Guidelines and the UNGPs, which emphasise human rights due diligence and other such measures to help companies to identify and mitigate potential harms. Thus their focus goes far beyond remediation of past harms to include assessment and avoidance of potential future harms. The NCP’s approach was limited to deciding whether GCM ‘properly perform[ed] its due diligence’ in respect of potential harms – a fairly cursory enquiry in this case. The deficiencies in the company’s due diligence were not acknowledged in the NCP’s final statement according to the Essex University Business and Human Rights Project (EBHR):

*‘Nowhere in the reasoning does the Company refer to the potential scale of human rights impacts [of the project]. The Company does not consider the possibility that if the degree of projected human rights violations is high enough, and there is no realistic prospect of measures that offer adequate compensation or other guarantees of protection for those affected, then the project should not go ahead. For this reason, it is*

*certainly arguable that the Company does not have processes that are robust enough – in their impartiality and accuracy – to address the effects of the mine.*<sup>209</sup>

Thus the NCP's interpretation of the Guidelines did not allow it space to consider the quality of the company's due diligence and whether it would in fact have met its obligation to address potential human rights impacts. It is open to question whether, given the nature of the project, the company would have been able to address potential impacts in a human rights-compliant fashion. Again as a result of its interpretation of the Guidelines as only backward-looking, the NCP did not deliberate on the issue at the heart of this complaint and the company's primary justification for the project, namely the company's attempts to trade off the rights of those displaced by the project or otherwise adversely affected, against the wider societal gain of better energy sources. As EBHR framed this:

*'It is ... not sufficient for the Company to broadly affirm as part of its defence that this Project will increase the enjoyment of human rights and other elements of the wellbeing of the wider society in Bangladesh. Given the extremely large population relocations called for, given the potentially strong impacts on the core rights which the principle of non-retrogression aims to protect, and given that the burden of proof is on the State to show that the relevant criteria are met, there is as yet no basis for the Company to promote the trade-offs between gains and losses to human rights, as it proposes to do.'*<sup>210</sup>

## **FINDINGS 8: Limitations in determining breaches**

The case studies reveal three areas of weakness in determining breaches and one strength:

- The UK NCP has invented a new category of breach which is not referred to in the Guidelines. The description of breaches as 'technical' has no basis in human rights frameworks and should be abandoned.
- The UK NCP has an inadequate understanding of the due diligence measures companies should take to avoid causing or contributing to human rights violations. This allows companies that are the subject of complaints to get away with deficient measures.
- The UK NCP underplays prospective future impacts of a company's activities, even when these are likely to have severe and far-reaching consequences on the rights of those affected. This ignores the preventive aspect of the Guidelines.
- Although it is hard to draw conclusions about the UK NCP's decision making from only three cases when it determines whether there has been a breach of the Guidelines, the *Privacy v Gamma* case approach to threshold of evidence provides a positive precedent that should be adopted in future.

## 9 Review

### KEY INFO 7: UK NCP Steering Board

The UK has a structure that is unique among its peers and which has helped to create a degree of independence. The NCP is based in the Department of Business but it has an inter-departmental Steering Board with four external members. The Steering Board is mandated to provide advice, oversee the effectiveness of the NCP and review decisions taken by the UK NCP to ensure that the procedures are followed.<sup>211</sup>

The Steering Board has been in existence since the major reforms of 2008 to the UK NCP mechanism. Its independent external membership and its ability to review alleged procedural errors are the UK NCP's two most distinctive features. At first the four external members were nominated by different constituencies that included the All Party Parliamentary Group (APPG) on the Great Lakes Region, the Trade Union Congress (TUC), the Confederation of Business and Industry (CBI) and NGOs. They were appointed by the relevant government minister for a three-year (renewable) period.<sup>212</sup> Alternate members were nominated but not formally appointed. In 2011, the UK NCP decided to confirm the existing external members and extend their mandates to ensure a degree of continuity. Over time there have been changes: neither the CBI nor the APPG on the Great Lakes Region continue to be actively involved in the work of the Steering Board so two external members have in effect been hand-picked by the UK NCP. In 2012 the practice of having alternate members was discontinued but partially revived two years later. The perception is that despite the UK NCP's stated commitment to diversity and equality,<sup>213</sup> this no longer seems to be adequately reflected in the composition or modus operandi of the Steering Board.

### 9.1 Review process

Board members involved in a review are not supposed to take into account the interest of any constituency or department they represent.<sup>214</sup> Ending the use of alternates has had two negative consequences: it has led to delays in reviews and reduced the pool of experts with relevant expertise, particularly in the area of human rights, to consider the applications. The NGO-nominated external member has on a number of occasions had to withdraw because of a (potential) conflict of interest and the TUC has ceased to provide an experienced lawyer to participate in reviews. In the view of the complainants some of the Review Committee's recent decisions suggest that the Steering Board is becoming less willing to challenge the position of the NCP on questions concerning admissibility and findings. This inevitably undermines trust in the impartiality of the Steering Board and its ability to fulfil its oversight function.

The review process is *'intended to identify procedural errors in the NCP's decision-making, and to ensure that, if identified, they are corrected to the extent possible.'*<sup>215</sup> But the Review Committee does not have the power to examine or rule upon the substance of the NCP's decision.<sup>216</sup> Either party to a complaint can therefore request that the procedure followed by the NCP be reviewed if it considers that the approach was not fair and proper. An application for review can be done after the initial assessment or before the final statement is published. If the NCP considers that a request is ineligible, frivolous or vexatious it will notify the Steering Board and recommend that the request be refused. The NCP's recommendation will become final unless three or more members of the Steering Board raise an objection.<sup>217</sup>

Since the 2011 update of the Guidelines, there appear to have been six applications for review: two concerned the NCP's initial assessment and four requests were made just before the final statements

were published. Most requests for review are made by complainants but two companies, Gamma and ENRC, have filed requests.<sup>218</sup> A statement subject to a review request is not generally published until the review is completed. This makes the need for speedy consideration of such requests particularly important to prevent companies ‘gaming’ the system.

### **CASE STUDY 14: Review request in *Privacy International v Gamma International UK LTD***

On 8 January 2014 the company informed the NCP that it wished to seek a review on the grounds that comments in the final statement about its engagement were unfair in light of the risks from parallel proceedings.<sup>219</sup> The NCP recommended that the Steering Board refuse the company’s request as ineligible because no error of procedure was identified. No objections were received.

*‘The UK NCP also considers that the company’s overall engagement with the NCP process has been unsatisfactory, particularly in view of the serious nature of the issues raised. Through its legal representative, the company has raised obstacles to the complaint’s progress, whilst failing to provide information that would help the NCP make a prompt and fair assessment of these. The NCP considers that this does not have the appearance or practical effect of acting in good faith and respecting the NCP process.’*

If a request for review is accepted the Steering Board may either:

- a) Remit the decision back to the NCP with instructions on how to rectify the procedural irregularity; or
- b) Acknowledge that there were deficiencies in the NCP process in the specific instance and make recommendations as to how those errors can be avoided in the future. However, the Board will not replace the decision with its own appraisal.<sup>220</sup>

If the decision is sent to the NCP for reconsideration, the NCP will re-open the case in accordance with the instructions of the Board, correct the deficiencies and, if necessary, reconsider its final statement.<sup>221</sup>

## **9.2 Role and influence of the Steering Board**

Reviews offer an invaluable opportunity for the Steering Board to clarify certain procedural issues. But there seems to be an incongruity between the Board’s increasingly stringent and legalistic views on the evidence required to substantiate a complaint at the initial assessment stage (set out in the UK NCP’s revised 2014 procedures) and the OECD’s interpretation of the Procedural Guidance (see above Section 6.1).

### **CASE STUDY 15: Review of the *Reprieve v BT* Complaint (1)**

The review of *Reprieve v BT* sets out the limits of what the NCP can consider as evidence and require from parties at the initial assessment stage:

*‘The Steering Board should perhaps re-emphasise that it is not the function of the NCP to conduct such research at the Initial Assessment phase, and that complainants, when first making a Complaint, should make available to the NCP all the information it believes the NCP should take into account when making the Initial Assessment.’<sup>222</sup>*

The Board upheld the NCP’s decision to reject the complaint.<sup>223</sup> It also stated that:



*'nothing in the Procedures requires the NCP to undertake independent research in considering a complaint'* not even if the information is in the public domain or available from the company. This seems to encourage the NCP to ignore the context surrounding many complaints which as in the *WWF v SOCO* case may be pertinent to the initial assessment. This position also appears to be at odds with the advice in the NCP Manual and the OECD's emphasis on NCPs adopting *'a problem solving approach through mediation'*.<sup>224</sup>

*'At this early stage, we recommend that the NCP hold off on determining whether or not the complaint is substantiated. Making a finding either way at this stage is likely to undermine the NCP's perceived impartiality and ability to offer good offices with either the company or the party raising the issue.'*<sup>225</sup>

The *Reprieve v BT* review included a more helpful separate note on interpreting due diligence and a consideration about the level of evidence required from complainants to substantiate a link as opposed to a 'specific link' between a company's activities and the Guidelines.<sup>226</sup>

### 9.3 Failure to implement recommendations from the review

On a number of occasions the UK NCP has either failed to implement or inadequately implemented the Steering Board's recommendations.

In the *Reprieve v BT* review, for example, the Steering Board invited the NCP to publish more detailed guidance with regard to the scope of the due diligence requirements so that *'both complainants and companies are clear as to the obligations they place upon companies'*.<sup>227</sup> But the NCP, without offering any further elaboration on how to interpret due diligence, simply reproduced the relevant paragraphs from the Commentary on General Policies of the 2011 OECD Guidelines and Chapter IV (Human Rights) Paragraph 5.<sup>228</sup> This is clearly not what the Steering Board had in mind.

The UK NCP used to have a reputation for producing thoughtful policies and guidance on particular issues such as parallel proceedings that were influential and often adopted by other NCPs.<sup>229</sup> It is apparent that the UK NCP no longer has the capacity to sustain that role.

#### CASE STUDY 16: *IAP and WDM v GCM*

In *IAP and WDM v GCM* the NCP was asked to reconsider its position that the Human Rights chapter in the 2011 Guidelines did not apply to the complaint. The Steering Board concluded:

*'There are circumstances where the current Guidelines might apply; and our recommendation is that the NCP should re-examine the Complaint solely in the light of this concern, and issue a new Final Statement reflecting this re-examination.'*<sup>230</sup>

The final published statement was virtually the same as the draft with only one minor change: a footnote had been added merely stating that a review and re-examination had taken place.<sup>231</sup> So, despite the fact that the review decision seemed to have vindicated the most important part of the complainants' request – the claim that the NCP should have investigated the risk of future human rights breaches – the final statement was hardly altered.

To the complainants this suggested that the NCP did not accept that it had misinterpreted the Guidelines, had not been willing to re-examine the complaint and that it persisted in upholding a highly restrictive view of the prospective application of the human rights provisions.<sup>232</sup>

The Steering Board did not require any further action by the NCP.

### **CASE STUDY 17: Request for Review: Lawyers for Palestinian Human Rights (LPHR)**

In its request, the applicant, LPHR, expressed concern about the *'the NCP's choice of cautious and apparently contradictory language'* in the draft final statement.<sup>233</sup> In particular LPHR questioned the use of the term 'technical' to describe G4S's breach of the fundamental provision of the Guidelines that companies must respect human rights. (See above section 8.3.1 *LPHR v G4S* Final Statement March 2015). LPHR considered the NCP's use of the term constituted a clear misinterpretation of the Guidelines.<sup>234</sup>

The NCP did not agree and made a recommendation that LPHR's request for review be rejected. The Steering Board upheld the NCP's position that the request was ineligible because it did not raise *'a genuine procedural issue'*. However in the final statement the NCP gives a misleading impression that there had been no objections.<sup>235</sup> In fact one Board member had objected and had asked for the statement to be amended. But this was not recorded in the Steering Board minutes or in the published final statement.<sup>236</sup> Although the objection would not have made any difference to the outcome, it is a matter of concern that the desire to convey the impression of unanimity outweighed the Steering Board's responsibility to respect and accurately record dissenting views.

### **FINDINGS 9: Review and oversight**

- The Steering Board has in some cases failed to direct the NCP to correct deficiencies in its procedures, including misinterpretations of the Guidelines.
- The Steering Board does not always challenge the NCP's recommendations when they do not reflect properly the substance of the Guidelines or the OECD's Procedural Guidance.
- The Steering Board's failings in conjunction with the NCP's failings are creating a conceptual and procedural vacuum.

# 10 Inconsistency of process

## 10.1 Impact of delays in the complaint process on affected communities

The UK NCP has seldom been able to conclude a case within the one-year timeframe. Issues of capacity and staffing are highly problematic and acknowledged by the NCP team themselves.<sup>237</sup> Unacceptable delays have resulted from:

- Lack of capacity and power to enforce participation and disclosure from companies;
- Inadequate expertise to deal with the variety of complaints submitted.

This materially undermines the ability of the NCP to promptly assess cases alongside the team's regular work and also prevent more in-depth examination and follow-up of cases.

In *RAID and ACIDH v ENRC* and *Crude Accountability et al v KPO Consortium*, the mediation has lasted well over 12 months. The final statements suffered further delays in these two cases and also in *IAP and WDM v GCM* and *LPHR v G4S*, all of which were filed on behalf of people affected by companies' operations and seeking a resolution of deteriorating situations.

Only in the *IAP and WDM v GCM* complaint did the NCP publish a statement to update parties on the status of the complaint. This update followed the request by the complainants for a review of the procedure of examination, which incurred a further delay in the publication of the final statement. No updates of the status for the *RAID and ACIDH v ENRC* complaint, the *Crude Accountability et al v KPO* complaint, and the *LPHR v G4S* complaint were published despite delays of more than 16 months in the mediation stage. During those long delays, the NCP has usually kept the complainants informed on the complaints' progress. But there has not been any monitoring of the companies' conduct nor any substantial improvement of the conditions on the ground.

### 10.1.1 Impact of delay in the *RAID and ACIDH v ENRC* complaint – no sustainable access to water

In the two years since the *RAID and ACIDH v ENRC* complaint was filed and accepted for mediation there has not been much improvement in the company's conduct or in the conditions of the communities trapped inside the mining concessions. One of the key and straightforward objectives of the complaint was to ensure reliable and sustainable supply of clean drinking water in the villages in the ENRC concessions. The supply of water in the villages has been provided by one of the subsidiaries of ENRC since 2007, but it is controlled by the company and/or the security company hired on the concession. Since 2009, however, the villages have been left without access to water for prolonged periods of time. The local communities represented in the complaint understand that the closure and disrepair of the water supply appears to be used as a form of collective punishment because of the activities of artisanal miners on the concessions. The filing of the complaint prompted ENRC to repair and reopen temporarily the water borehole and supply to the local communities.

In its initial assessment the NCP was satisfied that ENRC had addressed this problem by fixing the damaged water supply and by reopening it. Nevertheless, it also considered that the issue of water supply merited further examination because of the long '*period of unavailability and the uncertainty of its future security arising from the issue of security arrangements*' between the mining concessions, the village and artisanal miners.<sup>238</sup> Although the issue of water supply and security arrangements was included in the mediation as meriting further examination, the problem has been ongoing despite attempts to reach a mediated settlement. The delay in the mediation and the publication of a final statement have seen the water supply repeatedly interrupted and, according to the community, company representatives have knowingly allowed it to be cut off or left unrepaired even as mediation was taking place.<sup>239</sup>

## FINDINGS 10: Improving conditions on the ground

This case study reveals that the NCP does not always consider the precarious situation of the local communities and the potential of the complaint mechanism to improve conditions on the ground. The NCP should have enquired about the delay in the mediation, facilitated its conclusion, and conducted an examination of the complaint. A stronger position regarding the concerns over sustainable access to water and the villagers' human rights to water could also have supported the initial assessment.

### 10.2 Partiality of evidence

As observed in chapter 6, there are concerns that the UK NCP has an unwarranted amount of faith in corporate behaviour. While the institution is there to promote responsible business conduct on the basis of self-regulatory and voluntary standards, this is not the main purpose of the complaint mechanism. Its primary function is to enable dialogue and negotiation between parties to resolve issues and improve business conduct on the basis of the Guidelines.

In its assessment and examination of cases, it is understood that the NCP relies on documents and reports provided by both the complainants and the company as evidence and counter-evidence. However, in contrast to the high level and specificity of evidence required from complainants – i.e. to substantiate an issue, a link between the issue and the company's operations, a link between the issue and the Guidelines responsibilities of the company, and a business relationship, etc – it appears that the expectations of the NCP towards companies to provide evidence of responsible business practice are not as stringent. This concern has arisen at the initial assessment stage and also during the examination and mediation stages.

In the first *Reprieve v BT* case discussed above, the complainant sought a review of the NCP initial assessment. The Steering Board in charge of the review notes that,

*[the] Application is based on the premise that the NCP has failed to take account of public statements by the Company regarding its due diligence in relation to the service provided to its customer.*<sup>240</sup>

In their review, the Steering Board find that Reprieve misunderstood the role and capacity of the NCP. They recall their position that *'nothing in the Procedures requires the NCP to undertake independent research in considering a complaint'*.<sup>241</sup> In other words, the NCP is under no obligation to conduct in-depth research at the initial assessment stage nor can it force the company to disclose information that could provide a missing link.

Reprieve, however, felt that the onus had been put on them to provide all the information necessary to prove a missing link between the company's activity and the issue, when the company held this information but would not disclose it. In their proposal for a judicial review of the NCP's decision they state with regard to the opinion of the Steering Board's Review Committee:

*Further, Reprieve is not required to identify a "specific link". In the Note, the [Review] Committee takes the view that a specific link between impugned activities and adverse impact "may be beyond the capacity of most complaints." The Complaint is an illustrative example of the Committee's view. As stated at paragraph 30 above, Reprieve was unable to identify a link due to BT's refusal to provide Reprieve with required information. The dearth of information on the matter formed part of the basis for Reprieve's complaint. Identifying a link between BT's services and drone strikes in Yemen was thus beyond the scope of Reprieve's complaint. The NCP should not have placed a burden on Reprieve to identify a link between BT's contract and adverse human rights impacts.*<sup>242</sup>

The issue of partiality of evidence arises when there is a refusal of the company to disclose documents it declares confidential, which the NCP does not have the power to challenge. This, therefore, also limits the type of evidence available to the NCP to assess a company's conduct. A similar issue arose in *RAID and ACIDH v ENRC* where the NCP did not require that the company produce the relevant documents showing that it complied with the Democratic Republic of the Congo's environmental regulations for mining companies. Instead, it rejected the allegations under Chapter V as unsubstantiated.<sup>243</sup>

In *IAP and WDM v GCM*, despite the evidence demonstrating the inevitable harms which would ensue should the mining project go ahead, the NCP restricted the scope of examination to whether the company met the international standards to which it was committed and whether it included measures to foster trust among local communities.<sup>244</sup> Moreover, in its examination,<sup>245</sup> it disregarded the opinions of seven UN Special Rapporteurs on human rights about the inevitable human rights risks of the project. The NCP seems to have downplayed the statements by the UN Special Rapporteurs because they had based their information on allegations made by the complainants and had not requested clarification from GCM to verify the complainants' allegations. It also notes that the company was willing to engage with the Special Rapporteurs and did exchange information with them and responded to their queries.

The opinions of international human rights experts thus appear to have been discounted because they did not engage with the company. Instead, the NCP found goodwill in the company's approach. It accepted its declaration that it was committed to conduct a human rights impact assessment before the project proceeds and that its plans already included mitigation measures and development programmes that would offset the adverse human rights impacts. As previously noted, this line of argument was reiterated in the follow-up statement after recommendations, regardless of the ongoing opposition to the mine.<sup>246</sup>

These cases raise a further concern regarding the UK NCP's reliance on companies' reports and information about human rights impact assessments and due diligence – not all of which are publicly available because companies declare such information confidential and refuse to disclose it. Since the launch of the UN Guiding Principles in 2011, a trend has developed to measure corporate human rights performance in the form of human rights due diligence and human rights impact assessments. The information gathered in such reports is in great part based on quantitative data which seeks to measure a company's human rights performance against standards and indicators of its own choosing. Numerous mechanisms already exist that aim to do just that, but they present both opportunities and challenges particularly in representing not just what matters in terms of risk for a company, but for people affected by business activities.<sup>247</sup> Reports tend to emphasise what a company does well which can contribute to human rights and sustainable development, rather than actual adverse impacts. The box, 'Key Info 8', highlights some of the gaps identified by the UN Working Group on Business and Human Rights in their recent report on existing instruments which aim to measure corporate environmental, social and human rights impacts.<sup>248</sup>

### **KEY INFO 8: Measuring what matters**

#### **UN Working Group 2015 – Report on Measuring Corporate Human Rights Responsibility and Implementation of UNGPs**

##### **Gaps in data coverage: measuring what matters p14-15**

- Available information and existing measurement initiatives have significant gaps. [...] Information regarding the implementation of pillar 3 is relatively scarce. This is noteworthy in its oddness. While it is difficult, if not impossible, to measure how much harm has been prevented by States or companies' actions, it should be comparatively easier to measure how harm has been remedied when it occurred.

Continued over »

- Second, with regard to content, labour issues, health and safety and environmental impacts are each covered by a number of initiatives for both States and companies. Impacts on human rights are treated in a more generic fashion and, with the exception of rights in the workplace and discrimination relating to those, specific human rights such as land-related rights or freedom of expression are not adequately or comprehensively addressed. Likewise, most States and companies initiatives pay less attention to impacts on affected communities (such as indigenous and minority communities) and on human rights defenders.
- Third, a lot of initiatives relate to human rights commitments by companies or States, and to some extent about processes, but fewer to the actual impacts on the prevention or redress of human rights abuses.
- To some extent, that state of affairs reflects the areas where practices are strongest, as measurement efforts cover well-established issues on which information is available. The collective effect of those efforts, however, may de-prioritize themes or challenges that are more difficult to measure. The Working Group stresses that what must be measured is what is meaningful to know, not what is easiest to measure or suits existing measurement tools and resources.
- Furthermore, the process of measurement is not value-neutral. Deciding what and how to measure necessarily puts focus and value on some areas while skipping others. Care must be taken to base such choices on international human rights principles, placing human beings at the centre of the measurement tools.

## **FINDINGS 11: Transparency and disclosure**

The challenge raised in these cases concerns the fact that the NCP often accepts the word of a company and does not seem or does not have the power to probe further their confidential reports showing that they have carried out due diligence and human rights impact assessments.

The NCP should take into account the documents provided by companies which demonstrate that they are committed to established and recognised standards of responsible business conduct and act accordingly. However, it should encourage and should be in a position to require that companies disclose such documents following principles of transparency and accountability. Furthermore, the documents should be carefully examined and considered with the same level of exigency and expectation required of complainants to substantiate each of their allegations. A company's self-reporting should not be a reason to restrict the scope of a complaint.

### **10.3 Question of government interference**

In one complaint, *Reprive v BT*, the place of the UK NCP in the Department for Business, Innovation and Skills and therefore its independence from interferences by Ministers has been publicly questioned. The concerns of the complainants are reproduced in Case Study 18. They point to outstanding issues regarding the structure of the NCP, its location in this particular department, its funding by DFID, and the requirement that final statements be seen by Ministers.

## **CASE STUDY 18: *Reprive v BT* Proposal for judicial review of decision by NCP re BT drones involvement**<sup>249</sup>

### **Potential for bias following the appointment of the outgoing Chief Executive of BT Group as the Minister of State**

On 10 December 2013, Lord Livingston was appointed Minister of State for Trade and Investment. This was almost two months before the NCP took its decision on this case. He became a Minister of State affiliated to both BIS and the Foreign and Commonwealth Office.

- Prior to his governmental appointment, Lord Livingston was employed by BT. Until February 2005 he was the Finance Director of BT Group. Between 2005 and May 2008 he was the CEO of Retail. From June 2008 to June 2013 he was Group CEO of BT.
- The following factors created the potential for influencing the NCP's decision:
  - a) Lord Livingston had worked at BT for many years and was one of the most senior staff members at BT. Further, and as such, it is likely he played some part in securing the contract with the US military. He held shares in BT, which were transferred to a blind trust in December 2013;
  - b) While at BT, Lord Livingston corresponded directly with Reprive on the matters set out above;
  - c) The NCP is located within BIS;
  - d) It would appear Lord Livingston has direct authority over NCP staff members and the NCP is accountable to his department. The *UK National Contact Point for the OECD guidelines for multinational enterprises: annual report to the OECD investment committee for 2011/2012 (2012)* states at page 7 that, “*In 2001/2012 [sic] the UK NCP is funded by DFID but staffed by BIS & MOJ. We are therefore accountable to two Government Departments and Ministers.*”; and
  - e) It would appear BIS ministers have some involvement in the NCP's work. §5.4 of the *UK National Contact Point procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises (2014)* states: “*The NCP will inform the BIS Minister with responsibility for the OECD Guidelines once the Final Statement is ready to be published.*”

# 11 Conclusions

## 11.1 Barriers for complainants

The UK NCP is generally seen as a leading example for other NCPs. As this review of the complaints work of the NCP since 2011 has shown, there remain significant barriers for complainants. Two out of three complaints have been rejected outright or remitted to another NCP. Very few of those which have gone through mediation and examination have achieved a negotiated resolution or a determination of wrongdoing validating complainants' concerns and meeting their objectives. This review has found that barriers are both procedural and substantive. Obstacles are encountered at all stages of the process and vary depending on the stage reached by the complaint. The barriers are summarised below, with some recommendations for the NCP to help it address these set out in Chapter 12.

## 11.2 Accessibility

In light of the procedural criteria for OECD complaints, the main barrier confronting complainants remains one of accessibility. The UK NCP has rejected or referred two-thirds of the complaints submitted since 2011, and only partially accepted almost all of the others. Most were rejected on the basis of lack of substantiation because of the high and often changing standards of proof required. The level and specificity of evidence required at initial assessment to prove every aspect of the complaint and to substantiate links between the company's activities, its obligations under the Guidelines and the alleged issues often goes far beyond what would be expected of a preliminary sift to ensure that complaints are submitted on a *bona fide* basis. These high standards of proof at initial assessment appear to result from an interpretation of the Guidelines that is more stringent and narrow than the actual substance of the principles and their commentary; e.g. the principle that the Guidelines can apply to potential future harms has been misread by the UK NCP to exclude future impacts.

## 11.3 Predictability

Accessibility is also undermined by the unpredictability and inconsistency of the process. The NCP has struggled to keep within the one-year timeframe of the complaint process. This has been a serious issue especially in the cases involving mediation and examination, some of which have lasted more than two years, with negative consequences for affected people. Lack of capacity to follow the cases through and ensure that mediation and/or examination take place over a reasonable period of time is part of the problem. The predictability of the process is also undermined where the NCP does not have the capacity to overcome broad confidentiality requirements imposed by companies.

Lack of human rights expertise among NCP personnel has also been a critical impediment to assessing, examining and mediating cases that have raised new issues and are based on evolving concepts that are only now being put to the test in a non-judicial mechanism. This has led to the inconsistent assessment and examination of complaints – decisions are not always consistent with the Guidelines as well as with international human rights standards and best responsible business practice.<sup>250</sup>

The severity of human rights issues raised in the complaints, and the possibility to change and improve conditions for affected people, requires an approach based on human rights expertise that is capable of leading to meaningful change in companies' conduct.

## 11.4 Partiality and bias of evidence

Questions of partiality have arisen in a number of complaints, although these are difficult to verify. The question of partiality can also be linked to a certain bias in the assessment of evidence. It appears



that a greater evidential burden is placed on complainants to substantiate their allegations than that placed on companies to ‘defend’ themselves. While complainants are asked for a high level of specificity, the NCP seems content to consider and accept companies’ reports and general evidence of responsible conduct and to treat such general evidence as sufficient to override substantive aspects of the complaint.

At a time when the benchmarking of business responsibility for human rights is becoming the trend and the basis of evaluation of responsible business conduct, such reliance on companies’ own standards and reporting present both opportunities and challenges.<sup>251</sup> As noted by De Felice, indicators have *‘the potential for standardization, aggregation, and ultimately, comparability of human rights information over time and across companies [...] [But] measuring human rights is not an easy task. In particular, business and human rights indicators risk producing invalid results and non-emancipatory effects.’*<sup>252</sup>

The risk in relying on statistical information from social and environmental auditing and human rights impact assessments is that these might offer a blanket picture of a company’s practice. They might focus on those risks which a company has identified as the most critical for the sustainability of its operations, but which obscures those risks that matter for people affected by the company’s operations. Furthermore, they may be used to undermine the most salient issues raised in complaints on the basis that the company generally meets international standards of good practice.

Consequently, reliance on companies’ documents and evidence of self-regulation may betray a low level of expectation of responsible conduct and human rights due diligence. Furthermore, verifying the quality of due diligence and human rights impact assessments is often not possible because many companies refuse to disclose information about their due diligence and human rights impact assessments to the NCP and the complainants, arguing that these are confidential. The NCP should expect more than general level due diligence, have the power to require the disclosure of this information and make a clear determination of a breach of the Guidelines where a company does not meet its recommendations regarding the publication of its human rights impact assessments.<sup>253</sup>

Complainants in the cases involving state-company nexus, particularly those bearing on UK security interests or those of its allies, have raised concerns of government interference.

### 11.5 Selectivity in assessment and compatibility with the Guidelines

The mediated negotiations in *WWF v SOCO* and *ADHRB et al. v F1* have resulted in some positive changes such as the improvement of corporate policy and due diligence. SOCO also ceased its exploration operations in the Virunga World Heritage Site as a result of the mediation. As observed by OECD Watch in their report *Remedy Remains Rare*, these results are important because they are forward-looking and should contribute to preventing future harm. Nevertheless, a change of policy and corporate conduct is often only the bare minimum required to address the harm raised in a human rights-focused complaint.<sup>254</sup>

In the other cases involving extractive companies, the objectives were to achieve a resolution that would benefit the affected people represented in the complaint and lead to improved conditions on the ground. These objectives often require compensation and/or resettlement. Such outcomes have not been forthcoming. They were usually excluded from consideration as a result of the alteration of the scope of the complaint at initial assessment. The selective narrowing down of the scope of a complaint by the UK NCP amounts to a dilution of complainants’ concerns. This is compounded by the NCP’s reluctance to make a determination of non-compliance in its examination and in cases where mediation has failed. As a result most of the cases submitted to the UK NCP have been handled in a way that is not compatible with the OECD Guidelines.

# 12 Recommendations

## Structural

### The UK NCP

- The NCP should be reconstituted to incorporate a Panel of Experts composed of a roster of suitably qualified independent specialists with human rights and environmental experience, drawn from academics, lawyers, mediators, judges and others, who would undertake initial assessment, investigation and determination of complaints submitted to the NCP.
- The appointments process for this proposed Panel of Experts should be overseen by the ‘independent’ Steering Board rather than by BIS.
- The NCP’s role in complaints handling would be that of a secretariat.

### The Steering Board

- The Steering Board should be reconstituted to enable it to exercise effective oversight of the NCP, and to ensure its independence, objectivity and impartiality from vested interests.
- The Independent Steering Board’s terms of reference should be revised to reflect its independence and impartiality, to ensure clarity of roles and responsibilities, and to embody explicit rules of engagement for interacting with the NCP, with the proposed Panel of Experts, and with all parties to the complaint. Members of the Independent Steering Board should be external, appointed from outside government departments.
- The Independent Steering Board should be expanded to eight external members to ensure adequate capacity to deal with the volume of reviews that take place, and to provide the appropriate level of critical scrutiny.

### Government departments

- Government departments should reinforce adherence to the OECD Guidelines as part of their objectives in supporting and interacting with businesses, and in promoting UK investment abroad.

### The OECD

- The OECD Secretariat should enhance its capacity to bring about improved NCP performance with regard to the issues raised in this report and the obstacles faced by complainants.

## Procedural

### Appointment of UK NCP

- The NCP (including the proposed Panel of Experts) should be appointed with regard to the expertise necessary to understand complex issues in the field of business and human rights, including environmental impacts, and to interpret them in light of the OECD Guidelines for Multinational Enterprises.
- The appointment process for the NCP should be transparent, competence driven and overseen by the Independent Steering Board.

### The UK NCP’s capacity

- The staffing and financial resources made available to the NCP should reflect the capacity that is necessary to handle the volume of complaints received through all stages of the procedure, including assessment, mediation, determination and follow-up.

### The Review procedure

- The Review procedure requires fundamental reform. Requests for reviewing NCP decisions should be handled directly by the Independent Steering Board and removed from the influence of the NCP. Grounds for review should encompass substantive errors in the application of the Guidelines to the case in question.

### Substantive

- Complaints should be assessed and examined on merit with regard to the objectives and substance of the OECD Guidelines and evolving concepts in the field of business and human rights to ensure consistency and predictability.
- The NCP's definition of what constitutes a successful outcome to a complaint should be framed in a way that encompasses, as appropriate, changes in the conduct of the company and improved impacts for those affected on the ground.
- The current practice of imposing unreasonably high and sometimes unobtainable evidential thresholds at the initial assessment stage, that go beyond what is required to establish a complaint as 'bona fide and relevant to the implementation of the Guidelines', should be ended.
- Where the alleged conduct of a company is likely to have future harmful impacts on affected communities, these impacts should be considered as part of the process of determining whether there has been a breach, in light of the preventive aspects of the Guidelines.
- Where there is evidence of a company that is the subject of a complaint having 'caused or contributed' to human rights abuses, with regard to how such terms are defined in human rights norms or by expert opinion, the NCP should make a determination of a breach of the relevant provision of the Guidelines.
- Clear and transparent rules reflecting the above recommendations should be established.

### Consequences

- A company found to be in breach of the Guidelines should face consequences in keeping with the gravity of the breach. Such consequences might include denying access to public support and services, such as export credits. In cases of serious abuse, the UK government should ensure that civil, administrative and criminal liability mechanisms can be pursued respectively by complainants, regulatory bodies and the criminal justice system as appropriate.

## Annex 1 Rejected cases

Complaint	Synopsis <sup>255</sup>
<p><b>Repriev vs BT (1)</b> <b>05/11/2013-27/10/2014</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Para A2</li> <li>• Chapter IV Human Rights Paras 2, 3, 5, 6</li> </ul>	<ul style="list-style-type: none"> <li>• Reprieve alleges that BT has contributed to gross human rights violations by providing key communications infrastructure from a US military base in the UK to Camp Lemonnier in Djibouti, which is the covert centre from which armed US drones carry out lethal missions over Yemen.</li> <li>• The complainant furthermore alleges that BT is facilitating the US drone programme by providing the UK Government Communications Headquarters (GCHQ) and the National Security Agency (NSA) with mass surveillance infrastructure through wiretaps and compromised optical fibre networks.</li> <li>• The complaint alleges BT has not shown what human rights due diligence it carried out before entering into the contract with the US government and has not sought to prevent or mitigate human rights abuses.</li> <li>• Reprieve filed the complaint on behalf of a number of affected individuals who have lost relatives in drone strikes or continue to be impacted.</li> <li>• Reprieve requests the NCP to investigate BT's possible contribution to the gross violations of international law and human rights that the use of drones in non-war zones entails.</li> <li>• The UK NCP rejected the first complaint filed in 2013 by arguing that Reprieve had not substantiated a link between BT's communication services and the impact of the US drone operations.</li> </ul>
<p><b>Repriev vs BT (2)</b> <b>19/08/2014 - 12/01/2015</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Para A2</li> <li>• Chapter IV Human Rights Paras 2, 3, 5, 6</li> </ul>	<ul style="list-style-type: none"> <li>• After the UK NCP rejected Reprieve's initial complaint, journalists assisted in uncovering fresh evidence suggesting BT had constructed the fibre-optic cable with full knowledge that the communications line would utilise Defense Information Systems Network routers and KG-340 encryption devices. These elements of the fibre-optic cable were installed to fit specific NSA requirements to ensure the security necessary to process intelligence data and to issue commands for drones.</li> <li>• Based on this new evidence, Reprieve filed a second complaint with the NCP on 19 August 2014. In this complaint Reprieve alleges that both by contracting to provide the fibre-optics infrastructure for the US drone programme and by facilitating mass surveillance by intelligence agencies, BT has failed to respect human rights. Meanwhile, BT continues to ignore evidence of its complicity with the US drone programme.</li> <li>• On 26 September 2014, the NCP asked Reprieve to split its complaint into two separate complaints. This resulted in a third related complaint filed in October 2014 that solely focuses on BT's collaboration with intelligence agencies to implement mass surveillance programmes that have been acknowledged to feed directly into drone targeting.</li> </ul>
<p><b>Repriev vs BT (3)</b> <b>10/10/2014 -10/02/2015</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Para A2</li> <li>• Chapter IV Human Rights Paras 2, 3, 5, 6</li> </ul>	<ul style="list-style-type: none"> <li>• In January 2015, the UK NCP decided to reject the two complaints that were submitted in August and October 2014. According to the UK NCP, Reprieve could not substantiate its allegations and has not offered any new direct knowledge of the company's link to the impacts, but relied on new information from generally available sources.</li> <li>• With regard to the allegations that BT knowingly provided fibre-optics infrastructure for the US drone programme, the NCP assesses that it appears that the cable in question is a general purpose product. On the basis of the information submitted the NCP could not determine that the cable was necessary or designed specifically for drone operations. Despite this, the NCP did assess BT cables proximity to the drone operations to be significant. The NCP further considers that it was unaware that findings of international authorities or UK government policies should have suggested to BT that enhanced due diligence was warranted in supplying a general product to this customer.</li> </ul>

Complaint	Synopsis
<p><b>Reprieve vs G4S</b> <b>27/08/2014-31/12/2014</b></p> <p><b>Guidelines cited</b> Chapter IV Human rights Paras 1, 2, 3, 5</p>	<ul style="list-style-type: none"> <li>• The complaint alleges that G4S through the janitorial services contract of wholly-owned subsidiary G4S Government Solutions, Inc. may contribute to the ongoing human rights violations being perpetrated at the Guantánamo Bay detention camp.</li> <li>• The complaint alleges that through providing these services G4S enables the US government to continue inflicting human rights violations upon detainees. Reprieve argues that G4S services will facilitate the indefinite detention of prisoners, which is a breach of the internationally recognised right to a fair trial, the right to liberty and the protection against torture. According to the complaint, it is crucial that G4S clarify the details and extent of its contractual obligations at Guantánamo Bay since ‘custodial’, ‘facility management’, and ‘base support vehicles and equipment’ services could mean the company would be involved (either directly or indirectly) with FCE, force-feeding, and other unlawful and inhumane practices by the US military. Reprieve insists G4S should cease to provide services under the contract and clarify the nature and scope of the company’s work at Guantánamo, detailing specific contractual obligations. Additionally, Reprieve urges G4S to clarify its policy in relation to contracts for support of US counter-terror operations, particularly those related to torture and indefinite detention, including any risk assessment policy with respect to complicity in violations of international law. They further demand documentation on G4S’s human rights due diligence carried out prior to entering into the contract and any efforts made to prevent or mitigate the adverse human rights impacts to which G4S contributes.</li> <li>• The UK NCP decided to reject the complaint and recommended that the complaint be re-submitted to the US NCP, as the contract involves a US multinational and the US Navy. Furthermore, the UK NCP considers that the allegations refer to policies and practices of the US government in operating a US prison facility and accepts that overseas parent companies have limited influence over US subsidiaries.</li> </ul>
<p><b>Privacy International vs Vodafone Cable</b> <b>BT</b> <b>Verizon</b> <b>Interoute</b> <b>Viatel</b> <b>Level 3</b> <b>05/11/2013-27/10/2014</b></p> <p><b>Guidelines cited</b> Chapter II General Policies Paras A2, A10, A11, A12, B1</p> <p>Chapter IV Human Rights Paras 1, 2, 3, 4, 5</p>	<ul style="list-style-type: none"> <li>• The complaint alleges that the telecom companies facilitated mass interception of internet and telephone traffic by granting the UK’s Government Communications Headquarters (GCHQ) access to their fibre optic networks for the Tempora surveillance program. Privacy International argues that by collaborating with GCHQ and providing access to the networks, the companies knowingly enabled the mass and indiscriminate collection of data and interception of communications and thus contributed to the violation of human rights, including the right to privacy and freedom of expression.</li> <li>• The UK NCP forwarded the complaints to the companies named for a response. All rejected the allegations and insisted they had acted in accordance with the law. In July 2014 the UK NCP rejected the complaint on the basis that it believes the complainant was not able to substantiate a link between the six telecom companies and the allegations. The NCP is of the opinion that reports based on documents provided by Edward Snowden and published by the <i>Guardian</i> and <i>Suddeutsche Zeitung</i> do not substantiate a sufficient link between the companies and mass surveillance.</li> </ul>
<p><b>Former Employee vs UK Insurance company</b> <b>10/02/2013-07/06/2013</b></p> <p><b>Guidelines cited</b> Chapter IV Human Rights Paras 1, 2, 3, 6</p>	<ul style="list-style-type: none"> <li>• The complainant raised concerns related to his employment, and later redundancy, by the United Arab Emirates (UAE) office of a UK-registered insurance company. The complainant alleged that the company treated him in an unfair, discriminatory and threatening manner. As part of its initial assessment, the UK NCP forwarded the complaint to the company and requested a response.</li> <li>• The company denied all the allegations and indicated it did not consider the NCP process to be an appropriate forum for handling individual employment disputes. However, the UK NCP stated that it did consider such issues to be within the scope of its mandate. Nevertheless, after several exchanges of information with both the complainant and the company, the UK NCP decided to reject the complaint on the basis that the allegations were not substantiated.</li> </ul>

Complaint	Synopsis
<p><b>SEW and Stroitel vs Barclays</b> <b>31/07/2012-20/12/12</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter I Concepts and Principles Paras 2, 3, 8</li> <li>• Chapter II General Policies Paras A1, A2, A6, A7, A12, A13</li> <li>• Chapter III Disclosure Para 1</li> <li>• Chapter IV Human Rights Paras 1, 3</li> <li>• Chapter VI Environment Paras 1, 2</li> </ul>	<ul style="list-style-type: none"> <li>• Complainants, on behalf of residents living 1.2 km from the Sakhalin II Prigorodnoye Production Complex (the ‘Project’) a highly polluting liquefied natural gas (LNG) plant and oil and gas export terminals on Sakhalin Island, Russia, allege that Shell and three of the largest UK banks have severely harmed community members, endangering their health, jeopardising their food security, and polluting and destroying local environmental resources. Their homes have also been devalued by the Project to the point that they cannot sell them and buy other homes in safer locations. Despite these significant adverse impacts, community members have not been resettled or justly compensated.</li> <li>• According to the complaint, Shell, RBS, Standard Chartered and Barclays have a business relationship with the project operator, Sakhalin Energy Investment Company (‘SEIC’) and have a financial interest in the Sakhalin II project. Each of them failed to use their influence on SEIC to correct the environmental and human rights abuses associated with the Project.</li> <li>• The UK NCP rejected each of the complaints against the banks. In each case, the UK NCP reasoned that: a) enterprises are not accountable under the new provisions of the 2011 Guidelines for actions they took before those provisions applied, which according to the UK NCP is 1 September 2011; b) the due diligence provision added in Chapter 2, Paragraph 10 acknowledges that the nature and extent of due diligence will depend on circumstances and does not oblige enterprises proactively to review all their existing business relationships; and c) the UK NCP therefore looks for evidence that an enterprise should have been prompted to apply the provisions in a specific relationship. This evidence might relate to the enterprise’s knowledge of an ongoing impact, or to new actions or events that took place after 1 September 2011.</li> <li>• Regarding the complaint against Barclays, the company’s response to the complaint indicated that complainants had named Barclays in reliance on an erroneous report from a Bloomberg database. Complainants did not dispute that the Bloomberg database may have contained an error, of which they were unaware when they submitted the complaint. As a result, the complaint was rejected.</li> </ul>
<p><b>SEW and Stroitel vs RBS</b> <b>31/07/2012-20/12/12</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter I Concepts and Principles Paras 2, 3, 8</li> <li>• Chapter II General Policies Paras A1, A2, A6, A7, A12, A13</li> <li>• Chapter III Disclosure Para 1</li> <li>• Chapter IV Human Rights Paras 1, 3</li> <li>• Chapter VI Environment Paras 1, 2</li> </ul>	<ul style="list-style-type: none"> <li>• In rejecting the RBS complaint, the UK NCP argued that the necessary business relationship between RBS and SEIC had not been substantiated. Specifically, RBS’s response to the complaint indicated that a company it owned jointly with other banks had acquired a Netherlands-based bank in October 2007, which had earlier participated in a syndicate that made loans to Gazprom, a Russian company that became SEIC’s controlling shareholder around the same time the syndicate made the loans to Gazprom. These loans were corporate loans, which could have been used in the acquisition of SEIC, as alleged in the complaint. Thus, RBS had acquired these loans, but had not been a party to them, nor had SEIC. Moreover, because the loans were corporate loans, complainants were unable to prove that they had been for the purpose of acquiring SEIC, and RBS’s response to the UK NCP indicated that it would not disclose information that was confidential, commercially sensitive and/ or protected under contract law. The UK NCP noted that the loans, which RBS said had since lapsed, may have been used to acquire SEIC, but found that RBS’s link to SEIC was not substantiated because, at the time the loans were made, the Project was operational, and also because the acquisition occurred before RBS inherited the loans.</li> </ul>

Complaint	Synopsis
<p><b>SEW and Stroitel vs Standard Chartered</b> <b>31/07/2012-20/12/12</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter I Concepts and Principles Paras 2, 3, 8</li> <li>• Chapter II General Policies Paras A1, A2, A6, A7, A12, A13</li> <li>• Chapter III Disclosure Para 1</li> <li>• Chapter IV Human Rights Paras 1, 3</li> <li>• Chapter VI Environment Paras 1, 2</li> </ul>	<ul style="list-style-type: none"> <li>• The NCP rejected the complaint against Standard Chartered because it found that the actions already taken by the bank to monitor and evaluate SEIC were sufficient to meet its obligations under the Guidelines. The complainants strongly disagreed, arguing that the monitoring reports revealed SEIC's failure to implement key recommendations in early reports, but that later reports simply stopped mentioning those issues, inexplicably finding SEIC in compliance with its obligations, despite having never corrected previously identified problems. Under these circumstances, the bank should have done more than rely on the baseless conclusions in these reports.</li> </ul>
<p><b>Ms Z v Carnival</b> <b>16/01/2012-20/08/2012</b></p> <p><b>Guidelines cited</b> Chapter II Paras A2, A6, A7</p>	<ul style="list-style-type: none"> <li>• Ms Z filed a complaint against Carnival plc, owner of several cruise ships in India. Ms Z worked on Carnival's cruise ships for nine years and claims that she contracted diabetes and other health related conditions as a result of negligent medical treatment by the company, that Carnival failed to provide an effective operation-level grievance mechanism, and that she was discriminated against on the basis of her nationality.</li> <li>• The NCP rejected the complaint arguing that the allegations made in the complaint had not been supported by sufficient evidence and therefore had not been substantiated.</li> <li>• The complainant applied to the Review Committee of the NCP for review, questioning whether the NCP in making an initial assessment ought to have taken account of information from an authoritative source not submitted by a party, but available to the government. The Review Committee did not consider the NCP bound to take account of information not submitted by a party and is furthermore of the opinion that the additional information not considered by the NCP would not have had any bearing on the decision made.</li> </ul>

## Annex 2 Fully accepted case

Complaint	Synopsis <sup>256</sup>
<p><b>Privacy International v Gamma</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Paras A2, A10, A11, A12, A13</li> <li>• Chapter IV Human Rights Paras 1, 2, 3, 4, 5, 6</li> </ul>	<ul style="list-style-type: none"> <li>• The complaint alleged that Gamma and Trovicor are selling intrusive surveillance technology and training to the Bahrain government and that this technology is used to target human rights activists. By doing so, and by continuing to maintain the technologies, Gamma and Trovicor are alleged to be aiding and abetting the Bahrain government in its perpetration of human rights abuses, including violations of the right to privacy, freedom of expression and freedom of association, as well as arbitrary arrest and torture.</li> <li>• The Gamma case was accepted by the UK NCP on 24 June 2013 even though the NCP found that direct evidence about the company's supply of surveillance technology and training had not been provided by the complainants. While the UK NCP appointed an external mediator, the process had several flaws. The parties did not have an agreed agenda before they met, and information about who would represent the company was not provided.</li> <li>• In its final statement issued in December 2014 the UK NCP confirmed many of the issues raised in the complaint and found that Gamma's actions were inconsistent with a number of OECD Guidelines provisions. The NCP criticised Gamma for failing to put in place a due diligence process and commit to any binding standards for the observance of human rights. The NCP also considered that the company's overall engagement with the NCP process had been unsatisfactory.</li> <li>• Although the UK NCP was unable to verify the allegation that Gamma is linked to abuses through a supply to Bahrain, its recommendations to Gamma broadly applied to the company's future trading. The NCP recommends that Gamma participates in industry best practice schemes and reconsiders its communication strategy to enable the most transparent and consistent engagement. The NCP further recommends that the company co-operate with official remedy processes used by victims where it identifies that its products may have been misused.</li> </ul>



## Annex 3 Partially accepted cases

Complaints	Synopsis <sup>257</sup>
<p><b>Bahrain Watch and ADHRB v F1 World Management</b> <b>13/05/2014 – 10/04/2015</b></p> <p><b>Guidelines cited</b> Chapter II General Policies Paras A2, A7, A10, A11, A12, A13, A14 Chapter IV Human Rights Paras 1, 2, 3, 4, 5, 6</p>	<ul style="list-style-type: none"> <li>• The complaint questioned the human rights compatibility of organising the Formula One (F1) Grand Prix in Bahrain, a country widely criticised for its human rights violations. The complaint related to the F1 Bahrain races in 2012-2014 organised by private UK companies in the midst of ongoing human rights violations and in circumstances in which the event itself would give rise to further human rights violations.</li> <li>• The complaint alleged that by failing to suspend the F1 Grand Prix race, the companies involved in the organisation had, inadvertently or otherwise, contributed to further human rights violations in Bahrain and the continuation of impunity for past violations. The complaint contended that the companies had not conducted substantial due diligence and had not mitigated the human rights impacts linked to their operations in Bahrain. The complainant aimed to engage the companies involved in a mediated dialogue towards a solution that would not only serve their own corporate interests, but also respect the human rights of the people of Bahrain.</li> <li>• In October 2014, the UK NCP determined that the issues of a lack of meaningful stakeholder engagement and proper due diligence by Formula One World Championship Ltd. and Formula One Management Ltd. merited further review.</li> <li>• The NCP, however, rejected allegations referring to broad obligations to respect human rights and avoiding or addressing adverse impacts.</li> <li>• After the mediation, Formula One publicly committed to respecting internationally recognized human rights in all of its operations. It also committed to develop and implement a due diligence policy in which Formula One analyses and takes steps to mitigate any human rights impact that its activities may have on a host country, including on the human rights situation in Bahrain.</li> </ul>
<p><b>Lawyers for Palestinian Human Rights vs G4S Plc</b> <b>27/11/2013 – 05/2015</b></p> <p><b>Guidelines cited</b> Chapter II General Policies Para 2 Chapter IV Human Rights Paras 1, 2, 3, 5</p>	<ul style="list-style-type: none"> <li>• G4S and its Israeli subsidiaries provide, install, and maintain equipment that is used in military checkpoints at the Separation Barrier. The complaint alleged that G4S contributed to serious human rights abuses, including the detention and imprisonment of children in Israeli prison facilities, during which many alleged having being subject to torture and/or cruel and degrading treatment. LPHR requested that G4S provide information about where and how its equipment is used and what due diligence checks were conducted in providing it. The complaint also asked G4S to stop servicing the equipment, remove it, agree to an independent audit of these actions, and agree to identify ways to compensate the people who suffered adverse impacts.</li> <li>• On 22 May 2014, the NCP accepted the case; however, it rejected allegations relating to G4S's obligations to avoid causing or contributing to adverse human rights impacts and to conduct human rights due diligence.</li> <li>• G4S refused mediation, claiming it was legally bound to keep information relevant to the case confidential. It felt that LPHR did not have a mandate to negotiate and resolve the issues. The NCP thus conducted a further examination of the allegations in the complaint.</li> <li>• In its final statement the NCP found that G4S's actions 'are not consistent with its obligation under Chapter IV, Paragraph 3 of the OECD Guidelines to address impacts it is linked to by a business relationship.' As a result of this breach, the UK NCP found that G4S is also 'technically in breach' of other Guidelines provisions related to respect for human rights, but that the company had not failed to respect human rights in regard to its own operations.</li> </ul>

Complaint	Synopsis
<p><b>WWF v SOCO</b> <b>07/10/2013 -01/07/2014</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Paras A5, A14</li> <li>• Chapter IV Human Rights Para 5</li> <li>• Chapter VI Environment Paras 2a, 2b</li> </ul>	<ul style="list-style-type: none"> <li>• WWF’s complaint alleged SOCO’s oil exploration activities in Virunga National Park (Virunga) do not contribute to sustainable development. It alleged that SOCO: <ul style="list-style-type: none"> <li>- disregarded the DRC’s legal commitment to preserve Virunga’s World Heritage Site status.</li> <li>- negotiated a production sharing contract (PSC) with the DRC government that includes a ‘full freezing’ stabilisation clause effectively exempting it from any new laws or regulations, including protections for human rights, the environment, health and safety, or other policies relating to the pursuit of sustainable development in Virunga.</li> <li>- had not provided any evidence that it conducted appropriate and systematic human rights due diligence.</li> <li>- had failed to inform the public about the potential environment, health, and safety risks and impacts of its activities.</li> <li>- Community consultations had not been characterised by meaningful two-way communication. Its use of state security forces during consultations and as promoters of its project had created a ‘heightened risk of intimidation’ in which many local residents did not feel safe to express their views or concerns.</li> </ul> </li> <li>• WWF estimated that to bring SOCO’s operations into line with the Guidelines will require the immediate cessation of its activities in and around Virunga.</li> <li>• The UK NCP accepted the majority of the complaint in February 2014, rejecting only the allegation that SOCO had sought or accepted a legal exemption by accepting the company’s claim that it did not intend for the stabilisation clause to be applicable to anything beyond the ‘fiscal regime’.</li> <li>• The mediation resulted in an agreement and joint statement by the parties. As part of the statement, SOCO agreed <ul style="list-style-type: none"> <li>- to cease its operations in approximately 30 days.</li> <li>- not to undertake or commission any exploratory or other drilling within Virunga National Park unless UNESCO and the DRC government agree that such activities are not incompatible with its World Heritage status.</li> <li>- never again to jeopardise the value of any other World Heritage Sites anywhere in the world.</li> <li>- to undertake environmental impact assessments and human rights due diligence that complies with international norms and standards and industry best practice, including appropriate levels of community consultation and engagement on the basis of publicly available documents.</li> </ul> </li> </ul>
<p><b>Crude Accountability et al. v KPO Consortium</b> <b>06/06/2013 – pending final assessment</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Paras A2, A5, A7, A11, A12, A13, A14</li> <li>• Chapter IV Human Rights Paras 1, 2, 3, 5, 6</li> <li>• Chapter VI Environment Paras 1, 1a, 1b, 2, 2a, 2b, 4, 5</li> </ul>	<p>The complaints concern the Karachaganak Oil and Gas Condensate Fields with regard to environmental, health and human rights impacts on residents of Berezovka village in Kazakhstan. They alleged that the Karachaganak Petroleum Operating, B.V (KPO) Consortium, comprising BG, ENI, Chevron, Lukoil, and Kazmunaigaz, had:</p> <ul style="list-style-type: none"> <li>• abused the human rights of the residents of Berezovka by polluting the air, harming the health of the community and refusing to relocate residents to a safe, clean environment.</li> <li>• had repeatedly violated Kazakhstan’s environmental standards by exceeding emissions standards, improperly disposing of toxic waste, and polluting bodies of water.</li> <li>• had not made significant attempts to improve its environmental performance and had failed to implement environmental management systems appropriate to the risks of its operations.</li> <li>• had failed to disclose relevant non-financial information to stakeholders, failed to conduct appropriate due diligence, and failed to obey domestic Kazakhstan law with regard to the sanitary protection zone, in which no one is allowed to live.</li> <li>• The initial assessment narrowed the scope of mediation to those families located in the sanitary protection zone with a focus on finding a mediated solution with regard to their relocation to a safe and environmentally clean location.</li> <li>• The NCP rejected the complainants’ request to examine relocating Berezovka village because the Consortium’s obligation to do so had not been substantiated. The NCP also concluded that a link between KPO’s operations and the sinkholes in the village had not been established.</li> <li>• A procedural issue to note is that the NCP recommended the complainants bring in a UK partner since meetings would take place in London.</li> </ul>

Complaint	Synopsis
<p><b><i>RAID and ACIDH v ENRC</i></b>  <b>13/05/2013 – final assessment pending review</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Paras A1, A2, A3, A10, A11, A12</li> <li>• Chapter IV Human Rights Paras 1, 2, 3, 4, 5</li> <li>• Chapter VI Environment Paragraph</li> </ul>	<ul style="list-style-type: none"> <li>• The complaint filed by the law firm Russell-Cooke LLP acting on behalf of RAID concerned mining assets controlled by companies associated with ENRC in the DRC, including the Canadian company Africa Resources.</li> <li>• The complaint alleged human rights impacts affecting the impoverished populations of Kisankala and Lenge villages, which are located on two adjacent mining concessions in the province of Katanga. Specifically, the complaint alleged that Kisankala village's only clean water system had been in disrepair for more than 10 months following a clash between local security guards and artisanal miners based at Kisankala. In addition, the complaint addressed underlying problems the communities face, including claims concerning resettlement and compensation, the alleged absence of environmental and social monitoring, particularly for Lenge village, and the alleged misbehaviour of private security guards.</li> <li>• The UK NCP accepted the case in October 2013, but it refused to examine resettling Kisankala village and environmental and social monitoring in Lenge village, arguing there was 'insufficient evidence'. ENRC denied all the allegations, but indicated its willingness to enter into mediation.</li> <li>• The UK NCP engaged a professional mediator, but the mediation broke down. The NCP took eight months to prepare a final statement. ENRC requested that the procedure be reviewed but no date has yet been decided for the review or final statement.</li> </ul>
<p><b><i>IAP and WDM v GCM Resources</i></b>  <b>19/12/2014 – 20/11/2014</b>  <b>Follow-up 09/2015</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Paras A2, A7</li> <li>• Chapter IV Human Rights Paras 1, 2, 3, 4, 5</li> </ul>	<ul style="list-style-type: none"> <li>• The complaint filed on behalf of the communities alleged that GCM Resources plc abused the human rights of the communities, failed to properly consult them, and failed to disclose relevant information in their local languages. The core allegation of the complaint rested on the potential human rights violations that would ensue should the mining project go ahead, particularly the destruction of land-based livelihoods and the forced and uncompensated displacement of tens of thousands of people, including indigenous people.</li> <li>• GCM cannot avoid these forced evictions if its project is implemented. This means that violations of the human rights of tens of thousands of people are inevitable if GCM's project is implemented. Seven UN Special Rapporteurs have warned against the human rights impact of the project.</li> <li>• The UK accepted the complaint but argued that the allegations that GCM had failed to disclose information about risks and failed to prevent or mitigate human rights impacts were 'not substantiated' because the complainants had not shown that the impacts were happening or occurring on or after 1 September 2011, when the revised Guidelines took effect. Despite the threat the project represents for the fundamental human rights of so many people, the NCP refused to consider potential human rights impacts. Instead, the NCP accepted GCM Resources' claim that it will avoid and mitigate the impacts of relocating the estimated 54,000 people should the project proceed. The NCP narrowed the scope of examination to issues regarding violations of the rights of affected communities that have been shown to be inevitable, the alleged failure by GCM to follow its own self-regulatory standards, and whether the company's review of its plans in the period between September 2011 (when Chapter IV provisions were added to the Guidelines) and December 2012 (when the complaint was filed) included appropriate human rights due diligence.</li> <li>• The parties did not agree on the terms of mediation and the accepted allegations were further examined by the NCP. In its final statement the NCP concluded that it only found GCM in partial breach of its obligations to develop trusted self-regulatory practices and management systems, but not in breach of other human rights provisions.</li> <li>• The complainants challenged the findings and requested a review. In its statement the Review Committee noted that, as it considered the human rights abuses at issue in the case to be prospective, the NCP made a procedural error not to apply the 2011 Guidelines to the complaint and noted that the 2011 Guidelines clearly apply to prospective human rights abuses. Despite the recommendation of the Review Committee, there appears to have been no re-examination of the complaint. Instead the NCP added a short footnote stating that the review had taken place and that the 2011 Guidelines had been applied.</li> </ul>

## Annex 4 Cases filed with both UK NCP and another NCP but dealt with by the latter

Complaints	Synopsis <sup>258</sup>
<p><b>Human Rights Law Centre and RAID vs G4S</b> <b>23/09/2014 – 06/2015</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter II General Policies Paras A2, A8, A10, A11, A12</li> <li>• Chapter IV Human rights Paras 3, 5, 6</li> </ul>	<p>The complaint, submitted to both the UK and Australian NCPs, alleged that UK security contractor G4S failed to meet international standards and committed serious human rights violations in relation to the treatment of asylum seekers detained at an off-shore processing centre in Papua New Guinea (PNG).</p> <p>The complainants proposed the following recommendations to bring G4S's policies and procedures in line with the OECD guidelines: commitments with respect to a human rights framework for any future contracts it may enter into, commitments with respect to the payment of financial compensation to the detainees injured by G4S guards and to the family of an Iranian asylum seeker, disclosure of information on the outcomes of any internal investigations and disciplinary actions taken against staff involved in the violence, and disclosure of key documents which the company had not provided to the Senate Inquiry.</p> <p>The complaint was rejected by the Australian NCP arguing that</p> <ul style="list-style-type: none"> <li>- G4S as service provider is not accountable for government policy and that other mechanisms exist for review and scrutiny of policy.</li> <li>- It is unnecessary to have a review of the conduct of G4S staff, as it would be unlikely to add further value to already existing reviews.</li> <li>- There were various legal proceedings in relation to incidents at the MRPC in which the NCP did not want to intervene.</li> </ul>
<p><b>Amnesty International and Friends of the Earth International v Shell</b> <b>30/12/2011- 21/09/2014</b></p> <p><b>Guidelines Cited</b></p> <ul style="list-style-type: none"> <li>• 2000 Chapter III</li> <li>• 2000 Chapter V</li> <li>• Chapter IV</li> </ul>	<ul style="list-style-type: none"> <li>• Amnesty International and Friends of the Earth International alleged that Royal Dutch Shell breached human rights and environmental provisions of the Guidelines at its oil operations in Nigeria. The complainants were concerned by the practices and communications of Shell with regard to its operations in Ogoniland in the Niger Delta. According to the complainants, Shell was in breach of the OECD Guidelines because of the severe pollution it has caused, the company's slow and inadequate response to oil spills, and insufficient control and maintenance of oil infrastructure. The complaint also alleged that the information provided by Shell with regard to these matters was incorrect, misleading and unsubstantiated.</li> <li>• The case was accepted, but was put on hold until a related complaint filed in January 2011 was concluded. The complainants were disappointed in the outcome of that case, which convinced them that the Dutch NCP was incapable of contributing to a meaningful resolution of the dispute with Shell. The complainants thus decided to withdraw this case.</li> </ul>
<p><b>SEW and Stroitel v Shell</b> <b>31/07/2012-20/12/2012</b></p> <p><b>Guidelines cited</b></p> <ul style="list-style-type: none"> <li>• Chapter I Concepts and Principles Paras 2, 3, 8</li> <li>• Chapter II General Policies, Paras A1, A2, A6, A7, A12, A13</li> <li>• Chapter III Disclosure Para 1</li> <li>• Chapter IV Human Rights Paras 1, 3</li> <li>• Chapter VI Environment, Paras 1, 2</li> </ul>	<p><i>(Case synopsis see Annex 1 SEW &amp; Stroitel v Barclays)</i></p> <ul style="list-style-type: none"> <li>• In March 2013, the Dutch NCP rejected the complaint against Shell because it felt the issues raised were not material and substantiated and that moving forward would not likely contribute to the purpose and effectiveness of the 2011 Guidelines. Significant to the Dutch NCP's reasoning was its unexplained claim that Shell's history and present tensions with relevant companies and the Russian government indicated that Shell lacked the ability to exert substantial influence over the situation despite its 27.5% stake in SEIC. At no point in its initial assessment did the Dutch NCP identify the source of this claim or provide any further substantiating information. Complainants believe that the Dutch NCP failed to apply a fair and predictable standard to all relevant allegations because, while the initial assessment appropriately considered whether the issues raised in the notification were material and substantiated, it did not apply the same standard when considering the extent of Shell's leverage over SEIC.</li> <li>• Complainants also believe that the Dutch NCP's initial assessment was flawed on other fronts, including decisions that relate to the 2011 Guidelines such as sustainable development, human rights and corporations' responsibility for negative impacts associated with their business relationships. Particularly difficult to understand was the Dutch NCP's suggestion that allegations of human rights violations must first be litigated in a domestic or international court before being brought to the NCP.</li> </ul>

# Endnotes

## Executive summary/Recommendations

- 1 OECD, 2011, OECD Guidelines for Multinational Enterprises.
- 2 G7 Leaders' Declaration arising from annual summit in Germany in June 2015.
- 3 HM Government, September 2013, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, Chapter 4, UK Government and access to remedy for human rights abuses resulting from business activity.
- 4 OECD, 2011, OECD Guidelines for Multinational Enterprises, Commentary on the Implementation Procedures, para 25, Initial Assessment.
- 5 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *Reprieve against BT – Services provided to US Defence Agency*, January 2015, para 19.
- 6 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *Crude Accountability and others against companies in the KPO Consortium in Kazakhstan*, November 2013, paras 17-25.
- 7 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *Lawyers for Palestinian Human Rights v G4S*, May 2014, para 2.
- 8 OECD, 2011, OECD Guidelines for Multinational Enterprises, Chapter IV, Commentary on Human Rights.
- 9 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *Privacy International v Gamma*, June 2013, paras 21 and 25.
- 10 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *SEW and Stroitel v Bank A*, December 2012, paras 1-2; from *SEW and Stroitel v Bank B*, December 2012, para 7; and from *SEW and Stroitel v Bank C*, January 2013, para 31.
- 11 OECD, 2014, *Scope and application of 'business relationships' in the financial sector*, p6, OECD Global Forum on Responsible Business Conduct.
- 12 Office of the UN High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, 2012, p5.
- 13 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *IAP and WDM v GCM*, June 2013.
- 14 *Ibid*, para 22.
- 15 OECD, 2011, OECD Guidelines for Multinational Enterprises, Chapter IV, clauses 2 and 5.
- 16 Department for Business, Innovation and Skills, *Complaints brought under the OECD Guidelines for Multinational Enterprises to the UK National Contact Point: Review Procedures*, January 2011.
- 17 OECD, 2011, OECD Guidelines for Multinational Enterprises, Procedural Guidance, p.71-75.
- 18 Private communication.
- 19 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *IAP and WDM v GCM*, June 2013, paras 24-26.
- 20 De Felice D., 2015, *Measuring Respect for Human Rights by Corporations: Challenges and Opportunities in the Production of Business and Human Rights Indicators*, Human Rights Quarterly, 37, p511-555.

## Introduction

- 21 Norway NCP, 2014, Peer Review Report.
- 22 OECD WATCH, *Remedy Remains Rare: Assessing the contribution of the NCP system to improve access to remedy and observance of the OECD Guidelines*, May

- 2015, and Ruggie J and Nelson T, 2015, *Human Rights and OECD Guidelines*, p.12.
- 23 Amnesty International UK, *Briefing for UK National Contact Point on Human Rights Implementation of OECD Guidelines for Multinational Enterprises*, February 2013.
- 24 Department for Business, Innovation and Skills, *UK NCP Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* [URN 08/920], January 2014 (hereinafter 'BIS, 2014, UK NCP Complaints Procedure'), p. 4.

## Background

- 25 OECD, 2011, OECD Guidelines for Multinational Enterprises.
- 26 See OECD website for the full list: <http://mneguidelines.oecd.org/ncps/>. The terms, 'complaint' and 'case' are preferred in this report as an alternative to 'specific instance'. While the latter is used by the OECD and the UK NCP, it tends to obscure and undermine the remedial intention of the mechanism and that of complainants.
- 27 UN Security Council, *Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, [S/2002/1146] 16 October 2002. In an annex, the Panel listed 85 multinational companies including companies based in the UK, Belgium, Canada and the USA.
- 28 All Party Parliamentary Group on the Great Lakes Region, *The OECD Guidelines for Multinational Enterprises and the DRC*, February 2005.
- 29 Department for Business Enterprise and Regulatory Reform, *UK NCP Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* [URN 08/920], 28 April 2008.
- 30 OECD, 2011, Implementation Procedures of the OECD Guidelines for Multinational Enterprises (hereinafter OECD, 2011, Implementation Procedures).
- 31 John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, June 2008; A/ HRC/8/5; paragraph 98: 'The NCPs are potentially an important vehicle for providing remedy. However, with a few exceptions, experience suggests that in practice they have too often failed to meet this potential.'
- 32 HM Government, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*, September 2013.
- 33 Ruggie J. and Nelson T., 2015, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* CSR Initiative Working Paper No.66, Cambridge MA.
- 34 During 2014/15 there has been an attempt to revive the practice of having alternate members, but only the NGO member has taken advantage of this.
- 35 See for example the comments in section 8.3.1 about Lawyers for Palestinian Human Rights (LPHR) & G4S: Final Statement after Examination of Complaint, March 2015 (hereinafter *LPHR v G4S*, Final Statement, March 2015).
- 36 See for example, Recommendation of the Review Committee 22 September 2014, Complaint from International Accountability Project (IAP) and World Development Movement (WDM) against GCM Resources plc (GCM).
- 37 *Ibid*.
- 38 OECD, 2011, Implementation Procedures, para.18.
- 39 BIAC contribution to the OECD Global Forum on Responsible Business Conduct and the Informal Ministerial Meeting, 26-27 June 2014.

- 40 Winand Quaedvlieg, Chair of BIAC Investment Committee cited in the Business and Industry Advisory Committee to the OECD, *Annual Report 2014: A Business Agenda for Open Markets, Investment, and Sustainable Growth*, p.15.
- 41 OECD Watch is an international network of civil society organisations promoting corporate accountability. The purpose of OECD Watch is to inform the wider NGO community about policies and activities of the OECD's Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises. The OECD Watch case database is available at <http://www.oecdwatch.org/cases>.
- 42 The Trade Union Advisory Committee (TUAC) to the OECD is an interface for trade unions with the OECD. It is an international trade union organisation which has consultative status with the OECD and its various committees.
- 43 OECD Watch Submission to the OECD Working Party on Responsible Business Conduct, October 2013; TUAC Submission to the Joint Meeting of the Working Party on Responsible Business Conduct and the National Contact Points, December 2013.
- 44 Ruggie J and Nelson T, 2015, *Human Rights and OECD Guidelines*, p.20.
- 45 OECD Watch, 2015, *Remedy Remains Rare*.
- 46 United Nations General Assembly, United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, art. 3, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).
- 47 Amnesty International, 2014, *Injustice Incorporated: Corporate abuses and the human right to remedy*.
- 48 Ruggie J and Nelson T, 2015, *Human Rights and OECD Guidelines*.
- 2011, p. 23). The GFRBC also notes that 'Under the Guidelines, the due diligence provision uses the concept of "adverse impacts" to mean adverse human rights impacts to rights-holders, as well as all other types of adverse impacts on matters covered by the Guidelines, unless explicitly excluded. This means that impacts not addressed by traditional human rights, such as those related to the environment, corruption and industrial relations for example, should also be subject to risk-based due diligence' in GFRBC, 2014, *Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship*, Paris, p.2.
- 60 In the first case the allegation was refused because it occurred with the approval of the DRC government as part of the contract. In *Crude Accountability et al v KPO Consortium* the attempt by the consortium to reduce the security perimeter was overturned by a court in 2006. Since then the company appears not to have sought further exemption. Initial Assessment by the UK National Contact Point for the OECD Guidelines For Multinational Enterprises – Complaint from Crude Accountability and Others against Companies in the KPO Consortium in Kazakhstan, November 2013, p.8 para. 17 (hereinafter *Crude Accountability et al. v KPO Consortium*, Initial Assessment, November 2013): 'The evidence offered about the SPZ does not appear to the NCP to substantiate a specific requirement on the consortium to resettle the village. No evidence is offered to support the allegation that the consortium sought a reduction in the SPZ'.
- 61 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises – Complaint From WWF International Against SOCO International Plc February 2014, p.7 Para 19 (hereinafter *WWF v SOCO*, Initial Assessment, February 2014).

#### Methodology

- 49 UK NCP case statements are available at <https://www.gov.uk/government/collections/uk-national-contact-point-statements>.
- 50 The only UK NCP complaint that does not refer to the Human Rights Chapter principles is *War on Want and Change to Win v Alliance Boots*.
- 51 See Annex 4 of this report for case details.

#### Analysis of complaints submitted

- 52 Ruggie J and Nelson T, 2015, *Human Rights and OECD Guidelines*, p.13.
- 53 OECD Watch, 2015, *Remedy Remains Rare*.
- 54 OECD 2011 Guidelines, para.24.
- 55 BIS, 2014, UK NCP Complaints Procedure, above at 24, p.6.
- 56 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises – Complaint from an NGO against 6 UK Based Telecommunication Companies, July 2014, p.9 para.33, (hereinafter *Privacy Int. v 6 Telecoms*, Initial Assessment, July 2014).
- 57 Ruggie J and Nelson T, 2015, *Human Rights and OECD Guidelines*.
- 58 The partially accepted cases include: *IAP and WDM v GCM*; *WWF v SOCO*; *ADHRB v F1 and LPHR v G4S* (those are now concluded); *RAID and ACIDH v ENRC* and *Crude Accountability et al. v KPO Consortium* (those are still pending final assessment), see Annex 3 – Partially Accepted Cases. *Privacy International v Gamma* was the only case that was fully accepted and concluded Annex 2 – Fully Accepted Case.
- 59 The commentary for paragraph 2A10 notes that 'adverse impacts' applies to those matters covered by the Guidelines that are related to adverse impacts (OECD,

#### Complaints submitted and complainants' objectives

- 62 Chapter II, Paragraph 2, which entreats companies to respect human rights is still in the 2011 version of the Guidelines but expanded and complemented by the inclusion of Chapter IV on human rights.
- 63 IHRB event, OECD National Contact Points work with the ICT Sector, July 10 2015, London (hereinafter IHRB OECD NCP ICT event, 2015).
- 64 Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd.
- 65 See Review Committee in *Reprieve v BT (1)*, Application for Review of the Initial Assessment – Recommendation of the Review Committee, January 2014. The perspective was also reiterated in the IHRB OECD NCP ICT event, 2015.
- 66 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises – Complaint from *SEW and Stroitel v Bank A*, December 2012, para. 31 p.10 (hereinafter *SEW and Stroitel v Bank A*, Initial Assessment, December 2012): 'The complaints also raise some general issues about applying the Guidelines in the financial sector, and the UK NCP will ask the OECD to consider these in the context of its current work in this area.' The facts of the SEW and Stroitel complaint are discussed in section 6.3.2.
- 67 See OECD GFRBC, 2014, Scope and application of 'business relationships' in the financial sector, p.6.
- 68 The concern is a common one and was last heard during the workshop organised by IHRB OECD NCP ICT, 2015.
- 69 OECD WATCH, 2015, *Remedy Remains Rare*, p.10-11-18.
- 70 UN General Assembly, A/HRC/26/25, 2014 Report

- of the Working Group on the issue of human rights and transnational corporations and other business enterprises, para.23, p.9.
- 71 *Privacy International v Gamma*.
- 72 *Reprive v BT*, and *Privacy International v Vodafone Cable, BT, Viatel, Verizon Enterprise, Level 3, Interoute*.
- 73 *LPHR v G4S Israel, HRLC and RAID v G4S Manus Island, Reprive v G4S Guantanamo*.
- 74 *ADHRB v F1 Worldwide Management Ltd*.
- 75 For a discussion of silent complicity see Wettstein F, 2014, *Silence as Complicity: Elements of a Corporate Duty to Speak Out Against the Violation of Human Rights*, Business Ethics Quarterly / Volume 22 / Issue 01 / January 2012, pp 37-61.
- 76 IHRB OECD NCP ICT, 2015.
- 77 *Privacy Int. v 6 Telecoms*, Initial Assessment, July 2014, para 51.
- 78 See *Privacy International v 6 Telecoms* Table 1.
- 79 UNHRC, A/HRC/27/37, *The right to privacy in the digital age*, Report of the Office of the United Nations High Commissioner for Human Rights, para. 45. p.14.
- 80 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint From *Reprive v BT* (1), October 2013, paras 15-16 (hereinafter *Reprive v BT* (1), Initial Assessment, October 2013).
- 81 *WWF v SOCO; IAP and WDM v GCM; RAID and ACIDH v ENRC; Crude Accountability et al. v KPO Consortium (BG, ENI and Chevron)*.
- 82 The applicability of the due diligence principle in financial supply chains remains an outstanding issue, see discussion in Case Study 4 *SEW and Stroitel v Banks*.
- 83 Joint Statement by SOCO International PLC ('SOCO') and WWF, 11 June 2014.
- 84 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *IAP and WDM v GCM*, June 2013, p.10, para.36 (hereinafter *IAP and WDM v GCM*, Initial Assessment, June 2013)
- 85 *Ibid.*, para 35.
- 86 In its initial assessment of the *WWF v SOCO* complaint, the UK NCP noted that the complaint 'was not brought on behalf of a local community but refers to the wider interests of the international community in World Heritage Status', p.6, para. 13.
- 87 OECD Watch 2015, *Remedy Remains Rare*, p.21.
- Analysis of case handling at the Initial Assessment stage**
- 88 OECD Guidelines, 2011, Implementation, para. 22.
- 89 BIS, 2014, UK NCP Complaints Procedure, above at 24.
- 90 OECD Guidelines, 2011, Implementation, para. 25.
- 91 *Ibid.* These provisions are reproduced in the UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises, January 2014, p.11.
- 92 *Ibid.*, para. 20.
- 93 OECD Watch, 2015, *Remedy Remains Rare*, p. 26.
- 94 *Ibid.*
- 95 See Annex 1 – Rejected Cases.
- 96 *Privacy International v 6 telecoms* (stated x6); *Reprive v BT* (stated x3); *SEW and Stroitel v Banks* (stated x3); *Ms Z v Carnival; Former Employee v Insurance Company*.
- 97 *Privacy International v 6 telecoms* (stated x6); *Reprive v BT* (stated x2); *SEW and Stroitel v Bank A* (stated x1).
- 98 *Reprive v BT* (stated x3); *SEW and Stroitel v Banks B and C* (stated x2).
- 99 *Privacy International v 6 telecoms* (stated x6); *Reprive v BT* (stated x3), *Ms Z v Carnival*.
- 100 See Annex 3 – Partially Accepted Cases.
- 101 OECD Watch, *Quarterly Case Update of OECD Guidelines cases filed by civil society*, 10/1, June 2015, p.4.
- 102 *Privacy Int. v 6 Telecoms*, Initial Assessment, July 2014, paras 42-43.
- 103 *Ibid.*, para. 44.
- 104 *Ibid.*
- 105 *Ibid.*, para. 45. See section 6.3.2 for discussion of quality of source of information.
- 106 *Ibid.*, Annex 1: this matter was raised with the NCP in the complainant's request for a review of the Initial Assessment. The NCP rejected the request in a single sentence stating that the request did not identify an error of procedure (as is required for the review to take place, see section 9 Review).
- 107 *Reprive v BT* (1), Initial Assessment, October 2013, para. 1.
- 108 *Ibid.*, para. 13.
- 109 *Ibid.*, paras 14 and 15.
- 110 *Ibid.*, para. 14. *Reprive* Complaint of 15/7/13 paras 1 and 5.2.
- 111 *Ibid.*, para. 16. The NCP questioned, in its Response to a Review Request by *Reprive*, the threshold of evidence required to trigger 'heightened' due diligence. It asked the Review Committee whether it was for the complainant to prove a 'specific link' (between the adverse human rights impact and the company's operations, products or services) before any heightened due diligence requirements were engaged. The Review Committee introduced the concept of foreseeability (i.e. whether there was a foreseeable risk of the company contributing to the relevant impact) but expressed concern that proving a 'specific link' might be 'beyond the capacity of most complainants and that the Guidelines themselves do not propose a test of such stringency.' Review Committee, *Reprive v BT*, Review Recommendations, 2014.
- 112 *Ibid.*
- 113 *SEW and Stroitel v Banks*, Initial Assessment, December 2012 relating to Bank A, paras 1-2.
- 114 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *SEW and Stroitel v Bank B*, December 2012, (hereinafter *SEW and Stroitel v Bank B*, Initial Assessment, December 2012), para. 7.
- 115 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *SEW and Stroitel v Bank C*, January 2013, para. 31 p.10 (hereinafter *SEW and Stroitel v Bank C*, Initial Assessment, January 2013), para. 7.
- 116 Bank B, above at 114, para. 29.
- 117 *Ibid.*, para. 28.
- 118 Bank C, above at 115, para. 33.
- 119 *Ibid.*, paras 23-24.
- 120 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *Reprive v BT – Co-operation with Intelligence Agencies*, January 2015 (hereinafter *Reprive v BT – Co-operation with Intelligence Agencies* (2) Initial Assessment January 2015) para. 2 and Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *Reprive v BT – Services Provided to US Defence Agency*, January 2015 (hereinafter *Reprive v BT- Services Provided to US Defence Agency* (3), Initial Assessment, January 2015), para. 5.
- 121 *Reprive v BT – Intelligence Agencies*, *ibid.*, para. 4 and US Defence Agency para. 2.
- 122 *Reprive v BT – Intelligence Agencies*, *ibid.*, para. 18.
- 123 *Ibid.*, para. 20.
- 124 *Reprive v BT – US Defence Agency*, para. 28.
- 125 *Ibid.*, para. 29.
- 126 *WWF v SOCO*, Initial Assessment, February 2014.

- 127 *Ibid*, para. 20.  
 128 *Ibid*.  
 129 See section 8.3 Interpretation of the Guidelines at 'Determination of Breach' Stage.  
 130 WWF v SOCO, Initial Assessment, February 2014, para. 22.  
 131 *Ibid*.  
 132 *Ibid*.  
 133 *Privacy Int. v 6 Telecoms*, Initial Assessment, July 2014, p.12 at para 45.  
 134 *Reprieve v BT* – Co-operation with Intelligence Agencies (2) Initial Assessment January 2015, p.6 para. 18.  
 135 *Reprieve v BT*- Services Provided to US Defence Agency (3), Initial Assessment, January 2015, paras 18 and 19 p.6.  
 136 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *Crude Accountability v KPO Consortium*, November 2013 (hereinafter *Crude Accountability v KPO Consortium* Initial Assessment November 2013), and Initial Assessments by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *ADHRB v Formula 1*, October 2014 (hereinafter *ADHRB v F1* Initial Assessment October 2014); *LPHR v G4S*; *RAID and ACIDH v ENRC*.  
 137 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *Privacy International v Gamma*, June 2013 (hereinafter *Privacy International v Gamma* Initial Assessment June 2013).  
 138 *ADHRB v F1*; *LPHR v G4S*; *Crude Accountability et al. v KPO Consortium*; *RAID and ACIDH v ENRC*; *IAP and WDM v GCM*.  
 139 For instance the point is considered in Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *RAID and ACIDH v ENRC*, September 2013 (hereinafter *RAID and ACIDH v ENRC* Initial Assessment September 2013), para 38: 'Chapter IV provisions were added to the Guidelines in 2011 and are applied by the UK NCP to activities of enterprises from 1 September 2011 and to ongoing impacts known to enterprises at that date. The provisions contemplate a number of different relationships that an enterprise may have to human rights impacts. The complaint refers to an impact on the right of access to safe water and sanitation. The NCP considers that the complaint is made in respect of ENRC itself being involved with this impact (Paragraph 1 of Chapter IV) rather than causing or contributing to it (Paragraph 2) or being linked to it by a business relationship (Paragraph 3). This is because it does not appear to the NCP that the borehole supply system was provided in 2007 to maintain access to a safe water supply that the Canadian company's activities at that time otherwise compromised.'  
 140 This distinction between the 3 principles has been highlighted and emphasised in Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises Complaint from *LPHR v G4S*, May 2014 (hereinafter *LPHR v G4S* Initial Assessment May 2014), para.27; in *IAP and WDM v GCM*, Initial Assessment, June 2013, para.27; and in *RAID and ACIDH v ENRC*, Initial Assessment, September 2013, para.38.  
 141 *LPHR v G4S* Initial Assessment, *ibid*, para.27.; in *IAP & WDM v GCM*, Initial Assessment, June 2013, para.27; and in *RAID and ACIDH v ENRC*, Initial Assessment, September 2013, para.38.  
 142 *Crude Accountability et al v KPO Consortium* Initial Assessment November 2013.  
 143 *Ibid*, para. 1.  
 144 *Ibid*, paras 20-22.  
 145 *LPHR v G4S* Initial Assessment May 2014 para. 2.  
 146 *Ibid*, para. 29.  
 147 The company refused to take part in a mediation of those complaints that were accepted in the Initial Assessment.  
 148 *Ibid*, para. 31.  
 149 *Privacy International v Gamma* Initial Assessment June 2013, paras 21 and 25.  
 150 See Case study 3 *Reprieve v BT*.  
 151 See OECD, 2014, *Scope and application of 'business relationships' in the financial sector*, p.6 and OECD GFBRC, 2014, *Due diligence in the financial sector*, p. 10.  
 152 *SEW and Stroitel v Bank A*, Initial Assessment, December 2012, para. 25.  
 153 Office of the United Nations High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, 2012, p.5, above at 12.  
 154 *Ibid*, p.8.  
 155 *Reprieve v BT* (1), Initial Assessment, October 2013, para. 16.  
 156 OECD 2011 Guidelines, p.24.  
 157 OHCHR, 2012, above at 12, Interpretative Guide, pp. 31-45.  
 158 OECD Watch, Quarterly Case Update of OECD Guidelines cases filed by civil society, 9/2, December 2014, p.13.  
 159 See Annex 3 – Partially Accepted Cases for a synopsis of *IAP and WDM v GCM*.  
 160 *IAP and WDM v GCM*, Initial Assessment, June 2013, p.7, para.22.  
 161 *Ibid*, p.8, para.28.  
 162 *Ibid*, p.11, para 39.  
 163 *Ibid*, p.11, para. 38.  
 164 *Ibid*, para.36.  
 165 *Ibid*, p.11, para 37. There is a concern regarding the interpretation of the prospective application of the Guidelines which is further explored in section 8.3.2. Note that as a result of the mediation WWF v SOCO the company agreed to cease its activities in the Virunga World Heritage Site.  
 166 The 'Phulbari case: lessons for future strategies' workshop, Thursday 4 June 2015, Global Justice Now office.  
 167 UK NCP Follow-up Statement after Recommendations in Complaint from IAP and WDM against GCM plc, September 2015. This is the first case since the 2011 Guidelines which has had a follow-up statement, (hereinafter *IAP and WDM v GCM*, Follow-up Statement 2015).  
 168 *Ibid*.  
 169 *Ibid*. p.7, para 24.  
 170 See discussion of 'cause or contribute', section 6.4.1.  
 171 Private communication.  
 172 *Ibid*.
- Mediation**
- 173 *OECD Annual Report on the OECD Guidelines for Multinational Enterprises* 2014, p. 41. [http://www.keepeek.com/Digital-Asset-Management/oced/governance/annual-report-on-the-oecd-guidelines-for-multinational-enterprises-2014\\_mne-2014-en#page46](http://www.keepeek.com/Digital-Asset-Management/oced/governance/annual-report-on-the-oecd-guidelines-for-multinational-enterprises-2014_mne-2014-en#page46).  
 174 The LEAD Group and Innospec, Statement by the U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises, 2-3, Bureau of Economic and Business Affairs (1 Feb. 2012), available at <http://www.state.gov/e/eb/oced/usncp/links/rls/183059.htm>.  
 175 *OECD Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and*



- Consensus Building* OECD Publishing, available at: <http://www.oecd.org/corporate/mne/2012annualreportontheguidelinesformnes.htm> p. 43.
- 176 *Ibid.*
- 177 Consensus Building Institute (CBI), *NCP Mediation Manual*, May 2012 (revised July 2012). Available at: <http://www.cbuilding.org/publication/case/helping-oecd-ncps-use-mediation-implement-guidelines-multinational-enterprises>.
- 178 OECD (2012) *Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building* OECD Publishing, p 42.
- 179 CBI Manual, 2012, p. 17.
- 180 The cases are: *ADHRB v F1*; *LPHR v G4S*; WWF v SOCO; *Crude Accountability et al. v KPO Consortium* (at the time of writing the case had not been concluded); *RAID v ENRC*; *Privacy International et al. v Gamma*. A sixth case, *ECCHR v Cargill Cotton Limited*, which used the UK NCP's good offices, was concluded in June 2011 after a conciliation meeting.
- 181 *ADHRB v F1* Initial Assessment October 2014.
- 182 Dan Roan 'Bahrain F1 Grand Prix rights complaint "merits examination"' BBC News Online, 24 October 2014 <http://www.bbc.co.uk/news/uk-politics-29762156>.
- 183 BBC Online Sports News 'Bahrain Grand Prix: MPs want race cancelled because of unrest' 16 April 2013 <http://www.bbc.co.uk/sport/0/formula1/22165997>.
- 184 *ADHRB v F1* Initial Assessment October 2014.
- 185 *ADHRB v F1*, Final Statement May 2015.
- 186 *Forced Labor of Children and Adults in Uzbekistan – How Effective is the OECD Complaint Mechanism?* European Center for Constitutional and Human Rights e.V., Berlin, May 2013.
- 187 Kate Watters, *Crude Accountability*, questionnaire to OECD Watch, 15 April 2014.
- 188 Yvonne Veith, European Center for Constitutional and Human Rights, questionnaire to OECD Watch, 22 April 2014. Alinda Vermeer, Privacy International, questionnaire to OECD Watch, 15 April 2014.
- 189 Niall Watson, WWF UK.
- 190 Sarah Singh of Accountability Counsel, questionnaire to OECD Watch, 27 March 2014 in relation to the complaints about BG, Chevron and ENI. Her comments also refer to the *IAP and WDM v GCM* case, which did not go to mediation.
- 191 OECD Watch, 2015, *Remedy Remains Rare*, above at 23, p.38.
- 192 CBI NCP Manual, 2012, p. 24
- 193 CBI NCP Manual, 2012, p. 24.
- 194 Private communication.
- 195 UK NCP, 2014, *Procedures for Dealing with Complaints*, para. 4.2.2.
- 196 See Soco's website announcement available at: <https://www.socointernational.com/current-status>.
- 197 OECD 2011, *Implementation Procedures*, para. 30.
- 198 IDA Sawyer, *Congo's Virunga Park Rangers, Activists Still Need Justice*, Human Rights Watch, 11 June 2014. Available at <https://www.hrw.org/news/2014/06/11/dispatches-congos-virunga-park-rangers-activists-still-need-justice>.
- 199 *Global Witness, Virunga: UK company bankrolled soldiers accused of bribery and violence in quest for oil in Africa's oldest national park*, 15 June 2014. Available at <https://www.globalwitness.org/campaigns/democratic-republic-congo/soco-in-virunga/>.
- December 2014, para. 50.
- 204 *Ibid.*, para. 56.
- 205 The facts of this case are discussed in Case study 8 *Lawyers for Palestinian Human Rights v G4S* and Annex 3 – Partially Accepted Cases.
- 206 The OECD Guidelines and the UNGPs are almost identically worded. In the Commentary to GP 11 it explains that '[a]ddressing adverse human rights impacts requires taking adequate measures of prevention, mitigation and, where appropriate, remediation.'
- 207 G4S, OECD Final Statement on G4S's Activities in Israel, 9 June 2015. <http://www.g4s.com/en/Media%20Centre/News/2015/06/09/OECD%20Final%20Statement%20on%20G4S%20activities%20in%20Israel/> and G4S, Response to the Business and Human Rights Resource Centre, 10 June 2015 <http://business-humanrights.org/sites/default/files/documents/G4S%20Response%20to%20BHRRC%20-%2020100615.pdf>.
- 208 The key facts of this complaint are discussed in Case study 10 *IAP and WDM v GCM*.
- 209 Submission to the OECD UK National Contact Point Regarding the Phulbari project / Bangladesh by Essex Business and Human Rights Project (EBHR), para. 25.
- 210 *Ibid.*, para. 33.
- ## Review
- 211 OECD Watch, 2015, *Remedy Remains Rare*, p.34.
- 212 Terms of appointment of non-government members to the Steering Board of the UK National Contact Point (NCP), May 2012. The maximum period of appointment must not exceed 10 years.
- 213 *Ibid.*
- 214 Review Procedure for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises to the UK National Contact Point, BIS, 10 Dec 2008 (updated January 2011), (hereinafter 'Review Procedure') paragraph 5.3.
- 215 Review Committee, *Reprieve v BT*, Review Recommendations, 2014.
- 216 Review Procedure, 2008, para. 3.3.
- 217 *Ibid.*, para. 4.3.
- 218 The known requests concern the following cases: *Reprieve v BT 1*; *IAP and WDM v GCM*; *Ms Z v Carnival*. LPHR's application for review in its complaint against G4S was rejected as was Gamma International's request for a review in the complaint against it from Privacy International.
- 219 *Privacy International v Gamma International UK LTD*: Final Statement after Examination of Complaint, December 2014, Annex 1. A decision on ENRC's application for review is pending.
- 220 Review Procedures, 2008, para. 7.1.
- 221 *Ibid.*, para. 7.2.
- 222 *Reprieve v BT*, UK NCP, 2014.
- 223 UK NCP Procedure for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises: '*The NCP cannot accept additional representations on issues not included in the complaint and response*' para. 3.3.1.
- 224 CBI Manual, p.17, and OECD Annual Report on the OECD Guidelines for Multinational Enterprises, 2014.
- 225 CBI Manual, pp.22-23.
- 226 Review Committee, *Reprieve v BT*, Review Recommendations, 2014, p.7.
- 227 *Ibid.*
- 228 Compare BIS/15/70 Due Diligence – OECD Advice available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/399575/bis-15-70-due-diligence-oecd-advice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399575/bis-15-70-due-diligence-oecd-advice.pdf) and OECD 2011 Guidelines, p.34 paras. 45-46.
- 229 'Approach of the UK National Contact Point To Specific Instances in which there are Parallel Proceedings',
- ## Determination of breaches
- 200 OECD 2011, *Implementation Procedures*.
- 202 The facts of this case are discussed above in Case study 9 *Privacy International v Gamma* and available in Annex 2 – Fully Accepted Case.
- 203 *Privacy International v Gamma*, Final Statement,

- www.bis.gov.uk/assets/biscore/business-sectors/docs/a/11-652-approach-national-contact-point-parallel-proceedings.
- 230 Recommendation of the Review Committee – Complaint from IAP and WDM, 22 September 2014.
- 231 *IAP and WDM v GCM*, Final Statement, November 2014 footnote 1, p.21. ‘For the avoidance of doubt, the UK NCP states that it considers that the 2011 Guidelines will generally apply to actions of a company continuing after 1 September 2011 but begun before that date, and to impacts (including potential impacts and risks) arising before 1 September 2011 that are known to a company at that date and are not already resolved or addressed. The UK NCP confirms that the provisions of the 2011 Guidelines have been applied to such activities and impacts in its examination of this complaint.’
- 232 See Christine Haigh (WDM) ‘The global system for holding corporations to account is in need of serious reform’, *The Guardian* on-line 10 February 2015, available at [www.theguardian.com/global-development-professionals-network/2015/feb/10/the-global-system-for-holding-corporations-to-account-is-in-need-of-serious-reform](http://www.theguardian.com/global-development-professionals-network/2015/feb/10/the-global-system-for-holding-corporations-to-account-is-in-need-of-serious-reform).
- 233 Lawyers for Palestinian Human Rights, Commentary on the UK National Contact Point Final Statement, June 2015.
- 234 *Ibid.*
- 235 *LPHR v G4S*, Final Statement, March 2015; Annex 1. Paragraph 6. ‘A recommendation by the NCP under Paragraph 4.3 stands unless three or more Steering Board Members object. No objections were made in this case, and on 21 May 2015 the NCP informed the parties that the review request was refused and that the Final Statement issued on 31 March would now be published.’
- 236 Private communication.
- Inconsistency of process**
- 237 For instance the NCP apologised for the 11 months delay for the Initial Assessment of the *Privacy International v 6 Telecoms* complaint and explained that: ‘The UK NCP notes that there has been a significant delay in its handling of this complaint, and offers its apologies to the parties for this. A number of factors contributed to the delay including temporary resourcing and technical issues as well as the multiple parties involved.’ p.9. para.33. Lack of resources has also been reiterated as an impediment at the IHRB event, OECD National Contact Points work with the ICT Sector, July 10 2015, London.
- 238 *RAID and ACIDH v ENRC*, Initial Assessment, 2013, p.9, para 26.
- 239 Private communication.
- 240 Review Committee, *Reprieve v BT*, Review Recommendations, 2014, p.4.
- 241 *Ibid.*, p.3.
- 242 Reprieve letter to the UK NCP concerning ‘Proposed Judicial Review of decision by the NCP re BT drones involvement’ 1 May 2014, paras 42-43 available at [http://www.reprieve.org.uk/wp-content/uploads/2015/04/2014\\_05\\_01\\_PUB-Letter-before-claim-to-the-National-Contact-Point.pdf](http://www.reprieve.org.uk/wp-content/uploads/2015/04/2014_05_01_PUB-Letter-before-claim-to-the-National-Contact-Point.pdf).
- 243 Private communication.
- 244 *IAP and WDM v GCM*, Initial Assessment, 2013 paras 24-26, p.8. See discussion in section 6.5.1.
- 245 *IAP and WDM v GCM*, Final Assessment, 2014 paras 67-72, pp. 17-18. See discussion in section 8.3.2.
- 246 *IAP and WDM v GCM*, Follow up Statement, 2015, p.7, para 24.
- 247 De Felice D., 2015, *Measuring Respect for Human Rights by Corporations: Challenges and Opportunities in the Production of Business and Human Rights Indicators*, *Human Rights Quarterly*, 37, pp.511-555. Among many other initiatives see the Corporate Human Rights Benchmarking Project <http://www.ihrb.org/our-work/corporate-human-rights-benchmark.html>. For an overview of existing performance initiatives and indicators see Business & Human Rights Resource Centre’s portal on Measuring Business & Human Rights.
- 248 UN General Assembly, A/70/216, 30 July 2015, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises.
- 249 Reprieve letter to the UK NCP, 1 May 2014, paras 50-53.
- Conclusions**
- 250 The 2011 Guidelines, for instance, are aligned with the UN Guiding Principles. OECD, 2011, Guidelines, p.3.
- 251 De Felice D., 2015, *Measuring Respect for Human Rights by Corporations*.
- 252 *Ibid.*, p.514-515.
- 253 *IAP and WDM v GCM*, Follow-up Statement, 2015, p.7, para.24.
- 254 OECD WATCH, 2015, *Remedy Remains Rare*, p.18.
- Annexes**
- 255-258 From OECD Watch case database [www.amnesty.org.uk/ncpreports](http://www.amnesty.org.uk/ncpreports)

## **OBSTACLE COURSE**

### **How the UK's National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises**

Are British businesses being properly held to account for human rights abuses connected to their operations around the world? This Amnesty International report shows that they are not – in spite of the existence of an important complaints mechanism set up to implement international guidelines to which the UK is committed.

Each of the 46 governments adhering to the OECD's Guidelines for Multinational Enterprises has a National Contact Point (NCP) to handle complaints; the UK NCP is housed in the Department for Business, Innovation and Skills (BIS). The Guidelines set principles of good business practice and internationally recognised standards.

In 2011 the OECD Guidelines were revised to put greater emphasis on human rights. This report analyses the 25 human rights complaints submitted to the UK's NCP since 2011 – and finds that complainants face an obstacle course in having their cases examined. Fifteen were rejected outright at initial assessment stage, despite appearing to be bona fide and plausible, for reasons that are unclear and inconsistent with the requirements of the OECD Guidelines.

The UK NCP has established an unrealistic threshold of evidence for complainants to meet, especially for a non-judicial process with no power to award compensation or enforce change in business conduct. The NCP clearly lacks the expertise to address the human rights context of complaints – and it relies too heavily on general policies and information supplied by a company in its defence, even if these have little bearing on the issues raised in the complaint and on the plight of the affected individuals.

The report argues for a restructuring of the UK NCP to include a panel of human rights and environmental experts to undertake initial assessment, investigation and determination of complaints in keeping with the human rights standards and procedures set out in the OECD Guidelines. It also recommends establishing an Independent Steering Board to oversee the NCP's effectiveness and to review its decisions.

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